In the Supreme Court

OF THE

United States

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OCTOBER TERM, 1948

No. 788

ESTELLA LATTA, JONES M. GRIFFIN and ALVIN CHAMBERS,
Petitioners,

vs.

WESTERN INVESTMENT COMPANY (a corporation), et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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WESTERN INVESTMENT COMPANY (a corporation), et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Estella Latta, Jones Griffin and Alvin Chambers, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of

Appeals for the Ninth Circuit entered in the above-entitled cause, affirming the judgment of the United States District Court for the Northern District of California.

JURISDICTIONAL GROUNDS.

1. Jurisdiction is based upon diversity of citizenship.

2. Upon the ground that the Probate Court acted in excess of its jurisdiction in appointing Moses Hopkins, a person previously convicted of an infamous crime, as administrator.

3. Upon the ground that the plaintiffs have been divested of their property without due process of law in violation of Article V and XIV of the Amendments to the Constitution of the United States, and of Article I, Section 13 of the Constitution of the State of California.

4. Upon the ground of the extrinsic fraud practiced upon the Court and the brothers and sisters of Mark Hopkins, deceased, by said administrator, Moses Hopkins.

STATEMENT OF FACTS.

This was an appeal to the United States Court of Appeals for the Ninth Circuit from a judgment granting a motion to dismiss on the ground of laches, and the statute of limitations, a complaint for declaratory and other relief, wherein the plaintiffs seek to declare

an order appointing Moses Hopkins, administrator, the decree of distribution in the Estate of Mark Hopkins, deceased, and certain deeds, void, or in the alternative a declaration that the decree of distribution failed to distribute the entire estate. The complaint and amendments thereto in substance allege that Mark Hopkins died on March 29, 1878, and at the time of his death he was a resident of the City and County of San Francisco, State of California, and left estate therein. That at the time of his death his sole heirs were eight brothers and sisters, all of whom lived in the State of North Carolina, except one brother, Moses Hopkins, a resident of California; that on June 3, 1878, letters of administration were issued to Mary Frances Sherwood Hopkins, under the representations she was the surviving wife of Mark Hopkins, deceased, when as a matter of fact she was not his wife but his housekeeper. In 1881, Moses Hopkins, a brother of the decedent, a person previously convicted of an infamous crime, was substituted as administrator and continued to act as such until a purported decree of distribution was granted on or about November 1, 1883. In said decree the estate was ordered distributed to the alleged widow and the brother, Moses. Thereafter, certified copies of the decree of distribution were recorded in the various counties of the state where there was real property affected thereby. The fire of 1906 destroyed all the original records of the probate proceedings.

The complaint further alleges that during the administration of the estate, the administratrix and

administrator concealed from the Court properties worth many millions of dollars; that this property has never been distributed but was converted to the use of the administratrix and administrator; that Moses Hopkins failed to notify his brothers and sisters of the death of Mark Hopkins, and when inquiry was made in the early eighteen eighties, they were advised that Mark Hopkins had left a will and a widow and children; that the fraud perpetrated upon the plaintiffs' ancestors was not discovered until 1945.

The complaint alleges that plaintiffs are descendants of the brothers and sisters of Mark Hopkins other than Moses Hopkins, and bring this action in their own behalf, as well as in behalf of all other heirs similarly situated, the names of whom are attached to the complaint as an exhibit, numbering about two hundred.

Plaintiffs allege that in 1947, the Superior Court of the City and County of San Francisco denied an application for the appointment of an administrator *de bonis non.*

The prayer of the complaint in substance seeks a declaration that the decree of distribution is void, or in the alternative, that the property described in the complaint at all times was known to the administrator and that the decree did not distribute the properties described in the complaint and that the same remain vested in the heirs of Mark Hopkins, deceased, subject to administration. Also that the Court determine heirship and direct the Superior Court to appoint on administrator *de bonis non.*

The defendants in the action claim to deraign title to the real property described in the complaint through deeds executed by Samuel F. Hopkins, Moses Hopkins and Mary Frances Sherwood Hopkins during the administration of said estate, without an order of, or confirmation by, the Probate Court and without ever accounting to the estate or Probate Court for the proceeds from said sales.

Plaintiffs allege that the appointments of the administratrix and administrator were void for failure to state the names, ages and residences of the heirs known to the petitioner, in the petition for letters of administration, and for failure to afterwards prove the names, ages and residences of the seven brothers and sisters, heirs of Mark Hopkins, in the course of administration, as shown by the purported decree of distribution.

It is further alleged that the decree of distribution is void because Moses Hopkins in 1845, in North Carolina, was convicted of an infamous crime, thereby, under the California law, rendered ineligible to act in the capacity of administrator.

It is further alleged that the decree of distribution was a partial distribution of the estate, had upon the petition of the administrator and void by reason of the California statute, Section 1658 Code of Civil Procedure in effect in California, which, at the time of such partial distribution, did not authorize the administrator to petition for partial distribution, and any partial distribution made upon the petition of the administrator was void.

Plaintiffs allege that the omnibus clause "not now known or discovered which may belong to said estate, or in which said estate may have any interest" in the decree of distribution, did not distribute the assets of the estate not therein described, which were known to the administrator and which it is alleged he had concealed from the Court.

Plaintiffs further allege that said decree of distribution is indefinite as to heirship and void in that it fails to find who were the heirs of Mark Hopkins, and attempted to distribute the estate to Mary Frances Sherwood-Hopkins and the administrator Moses Hopkins, describing them as the only persons interested in said estate.

Appellees moved for a dismissal of the complaint upon the ground that the causes of action are barred by the statute of limitations; and that the claims are stale and the plaintiffs and their ancestors are guilty of laches.

The motion of appellees was granted.

JURISDICTION OF THE UNITED STATES SUPREME COURT.

The jurisdiction of this Honorable Court is invoked under Section 240(A) of the Judicial Code as amended June 7, 1934. (48 Stat. 926.) Federal jurisdiction was based on diversity of citizenship and amount. (28 U.S.C.A. 347.) Plaintiffs are citizens of states other than California, defendants are citizens of the State of California and have places of business in said state.

The matters in controversy exceed, exclusive of interest and cost, the value of three thousand dollars. (R. 5, Par. 10.)

Diversity of citizenship. (R. 3, Par. 2.)

4 *Fed. Stats. Ann.,* Section 716, page 498 (Synopsis).

The Supreme Court shall have power to issue writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdiction.

Petitioners were deprived of property without due process of law in violation of Articles V and XIV of the Amendments to the Constitution of the United States, and Article I, Section 13 of the Constitution of the State of California. (R. 20, Par. 20.)

"No person shall be deprived of property without due process of law."

Huber v. Ruby, 53 Pa. 112;
12 *Corp. Jur.,* p. 1190;
Varden v. Mount, 78 Ky. 86-89;
Parson v. Russell, 11 Mich. 113-121.

When time has expired and no appeal could be had, the powers of the equity Court are available if the decree has been fraudulently obtained.

Barber v. Superior Court, 43 Cal. App. 221-224, 184 Pac. 952.

The order of the District Court granting motion to dismiss is a final order or judgment. (R. 196.)

Southern Pacific R. R. v. Willett, 126 Cal. App. 380, 14 P. (2d) 526.

The date of the judgment rendered in this action by the United States Court of Appeals for the Ninth Circuit was February 25, 1949.

> *Byres v. McCauley,* 149 U. S. 608 at 614:
> "A distributee citizen of other states may establish his rights to a share in the estate, and enforce such adjudication against the administrator personally, or his sureties, or any other parties subject to liability, or in any way which does not disturb the possession of property held by the state courts if in actual possession."
>
> *Baker v. Eastman,* 206 Fed. 865:
> "Where there is a controversy between parties of different states, it comes within the jurisdiction of the federal court."
>
> *Gains v. Fuetee,* 92 U.S. at 104.

THE QUESTIONS INVOLVED.

1. It appears from the allegations of the complaint that the order appointing Moses Hopkins administrator, a person previously convicted of an infamous crime, was in excess of the Court's jurisdiction and void, and not barred by limitations and laches. (R. 80.)

2. Does the statute of limitations and laches run against an action to declare a judgment void?

3. Does a void judgment bar or bind anyone?

4. Does laches result from mere passage of time?

5. Does the mere fact of determination of the controversy involving an investigation of rights originat-

ing 64 years ago render the cause of action stale, where the cause of action is based upon a claim that the Court acted in excess of its jurisdiction, and where extrinsic fraud and void instruments are alleged as the basis of the action?

6. Did the deed executed by Samuel F. Hopkins and Moses Hopkins to Mary Frances Sherwood Hopkins, Exhibit "B" of the complaint (R. 53) to which first parties attempted to convey all their right, title and interest in all the real estate of which Mark Hopkins died seized and possessed, situated lying and being within the State of California, without further description, convey the interest of the plaintiffs' predecessors, the brothers and sisters of Mark Hopkins, not parties to said deed? Mary Francis and Samuel Hopkins not related to Mark Hopkins.

7. Did the deed, Exhibit "C" (R. 55), executed by Mary Frances and Samuel Hopkins (not related to Mark Hopkins) and Moses Hopkins, convey to Collis P. Huntington, et al., all the real estate, right, title and interest that Mark Hopkins, deceased, had at the time of his death and all that his estate or the parties of the first part, as his heirs at law, have since acquired by operation of law, or otherwise, in all the real and personal property described in said deed, convey the interest of plaintiffs' predecessors, the brothers and sisters of Mark Hopkins, who were not parties to said deed?

8. Did the deed, Exhibit "D" (R. 61), executed on the 16th day of January 1880, by Ellen Colton, Mary Frances, and Samuel Hopkins (not related to Mark

Hopkins, deceased), and Moses Hopkins, et al., to the Ione Coal Co., executed during the administration of Mary Frances Sherwood-Hopkins, signed individually by her, and without any order or confirmation of the Probate Court, attempting to convey the one-fifth interest owned by Mark Hopkins, deceased, at the time of his death, containing eleven leagues of land as shown on the face of the deed, convey the interest of plaintiffs' predecessors, the brothers and sisters of Mark Hopkins, who were not parties to said deed?

9. Are the deeds, Exhibits "C" and "D" (R. 55-61), executed by Mary Frances Sherwood-Hopkins, then acting administratrix of the estate of Mark Hopkins, deceased, Moses and Samuel Hopkins, and purporting to convey all the interest of said estate in the property described in said deeds, but showing on their face neither order of nor confirmation by the Probate Court, void as to the interest of the plaintiffs and their predecessors, as alleged in the complaint? (R. 28, Pars. 36, 37, 43; R. 22, Par. 24.) They were not parties to said deeds.

10. Were the above referred to deeds, which failed to show on their face that the grantors had on order of or confirmation of the Probate Court, giving authority to sell and convey the property therein described, said deeds being recorded in the Counties where the lands were situated, give notice to subsequent purchasers of the defects shown on the face of the deeds?

11. Is the decree of distribution (R. 49, Exhibit "A"), void on its face for the following reasons as set out in Paragraph 19 of the complaint:

a. In the third paragraph of the decree, the Court failed to find who were the heirs of Mark Hopkins, deceased, but in lieu thereof distributed the property to "parties interested" and failed to find that the parties to whom the estate was distributed were the heirs at law, or the only heirs of Mark Hopkins, deceased.

b. In the fourth paragraph of the decree it shows upon its face that the administrator had on hand the total sum of $895,894.01, and only distributed the sum of $895,078.01 and failed to distribute the sum of $816.00 cash on hand as shown by the account. The decree shows on its face that it did not distribute all of the estate accounted for by the administrator, and was not a final distribution, but one of partial distribution made on the petition of the administrator. (R. 10, Par. 19, subsec. D; R. 49, Exhibit "A".)

c. The decree of distribution shows on its face (R. 15, Exhibit "H"), that all of the real property of the estate of Mark Hopkins, deceased, was distributed to Mary Frances Sherwood-Hopkins, solely upon the agreement entered into between Mary Frances and Samuel Hopkins (not related to Mark Hopkins) and Moses Hopkins without a finding of heirship.

d. Did such agreement convey the vested interest of the seven brothers and sisters of Mark Hopkins, deceased, predecessors of plaintiffs not parties to said agreement?

e. Where, as shown by the complaint (R. Par. 18, subsec. M, pp. 18, 19, 20) that Moses Hopkins, administrator, occupied another and more vital relation to the heirs, the seven brothers and sisters, predecessors of the plaintffs, being a brother and acting as their personal representative and trustee as administrator, assumed a legal duty, not only during and through the course of probate and administration of said estate, to make full disclosure to the Court and to those heirs, his seven brothers and sisters, as to the nature, extent and character of said estate and fully inform them of their rights in the premises to the end that their rights may be fully protected, but failed to do so, and to the contrary, as shown on the face of the decree of distribution represented to the Court that he and Mary Frances Sherwood-Hopkins were the only parties interested in said estate, and the Court relying on said representations, distributed the whole of said estate to said administartor and Mary Frances Sherwood-Hopkins,— was said decree of distribution void by reason of such premeditated fraud?

12. Did the decree of distribution (R. 49, Exhibit "A") which ordered, "that the account of the administrator be and the same is hereby settled, allowed and approved and the residue of said estate hereinafter particularly described, and any other property not now known or discovered which may belong to said estate, or in which said estate may have any interest,

be and the same is hereby distributed as follows, three fourths (¾) to Mary Frances Sherwood-Hopkins, and one fourth (¼) to Moses Hopkins", distribute the $24,940,592.29, of the personal property that the administrator, Moses Hopkins knew of, and had in his possession on and prior to and at the time of the distribution, but not included in his report to the Probate Court, and not accounted for, but concealed from the Court. (Complaint, R. 11 to 15, inclusive, Par. 19, subsecs. F. and G.)

13. Were the seven brothers and sisters of Mark Hopkins, under the allegations in the complaint (R. 80), deprived of their property without due process of law in violation of Articles V and XIV of the Constitution of the United States, and Article I, Section 13, of the Constitution of the State of California?

REASONS WHY THE UNITED STATES SUPREME COURT SHOULD HEAR THIS CASE.

This action is one of gravity and general importance and is brought to establish the fact of the commission of one of the most stupendous frauds in the history of probate procedure; and to establish the rights of the heirs of Mark Hopkins, deceased.

Petitioners ask this Honorable Supreme Court to review the judgment of the United States Court of Appeals for the Ninth Circuit, which petitioners contend is in conflict with the established principles of law and equity, in order to secure uniformities of the

decisions, and to settle important questions of constitutional law.

The judgment of the Court of Appeals held that the statute of limitations and laches run against void judgments, void instruments and judgments in excess of the Court's jurisdiction.

1. The Honorable Court of Appeals held that the appointment of Moses Hopkins administrator, a person who had been previously convicted of an infamous crime, and was by statute of the State of California ineligible to qualify as administrator, valid, and that the letters of administration issued to him become conclusive evidence of his qualification, and may be attacked only in a direct proceeding, and not collaterally. *This is a direct attack.*

33 *C.J.S.* 948 see subdiv. conviction of crime;
Plotnaner v. Forni, 21 Pac. (2d) 638;
C.C.P.Cal. Sec. 1369, in effect 1878, now *Pro. Code* 401-420;
N. C. Code, Chap. 28, Sec. 8, Vol. 2;
Freeman on Judgments, 4th Ed. Sec. 117;
American Jur. Vol. 21, pp. 439-450, Sec. 28;
Knox v. Nobles, 28 N.Y.Sup. 355, also, 27 N.Y. Sup. 206;
Scott v. McNeal, 154 U.S. 34-46-50;
Continental Trust Co. v. Nobles, 30 N.Y. Sup. 994;
In re Martin Estate, 31 Cal. App. (2d) 680, 88 Pac. (2d) 755;
Hong v. Primean, 98 Mich. 91, 57 N.W. 25;

Estate of Agour, 165 Cal. 142, 132 Pac. 587;
Hinkle v. Eichelberger, 2 Pa. 483;
Carr v. Ill. C. R. Co., 43 L.R.A. 634.

2. The petitioners allege facts in their complaint establishing that the letters of administration, the decree of distribution and the deeds set out in the complaint were obtained by extrinsic fraud practiced upon the Court, and upon the seven brothers and sisters of Mark Hopkins. The rule stated by the Court and authorities cited by it are applicable only in the absence of fraud and excess of jurisdiction, or void instruments, and is contrary to the express provisions of the Probate Code of California, Sec. 302, which says:

> "In the absence of fraud in its procurement an order of the Superior Court granting letters when it becomes final, is a conclusive determination of the jurisdiction of the Court."

Campbell-Kawannanakoa v. Campbell, et al., 152 Cal. 201, 92 P. 184;
Sohler v. Sohler, 135 Cal. 323, 67 P. 282;
Zaremba v. Woods, et al., 17 Cal. App. (2d) 309, 61 P. (2d) 976.

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3. THE DOCTRINE OF LACHES AND STALE CLAIMS HAS NO APPLICATION.

The allegations in the complaint and the affidavits and other evidence accepted by the Court do not show that the doctrine of laches and statute of limitations, upon which the District Court and the Court of Ap-

peals dismissed this action, is applicable to the facts alleged in the complaint, for the following reasons:

I. Laches and statute of limitations do not run against void judgments and void instruments.

Thayer v. Village of Downers Grove, 16 N.E. (2d) 715-719;

Nichols v. Superior Court, 28 Pac. (2d) 714;

15 *Cal. Jur.* p. 57, Sec. 143;

Estate of Pussy, 180 Cal. 368; 181 Pac. 648;

Estate of Eikerenkonter, 126 Cal. 54; 58 Pac. 370;

Garrison v. Blanchard et al., 127 Cal. App. 616; 16 P. (2d) 273-275.

II. The order appointing Moses Hopkins previously convicted of an infamous crime, was in excess of the Court's jurisdiction and void; Sec. 1369 C.C.P. of California in effect in 1881 at the time of the appointment of Moses Hopkins as administrator; now Secs. 401 and 420 of the California Probate Code, prohibits such appointment.

Rescue Army v. Municipal Court, 171 P. (2d) 8-11;

Fortunbary v. Superior Court, 16 Cal. (2d) 405; 106 P. (2d) 411;

Spreckels v. Industrial Acc. Comm., 186 Cal. 256-260, 199 P. 819;

Knox v. Nobles, 28 N.Y. Sup. 355;

Knox v. Nobles, 27 N.Y. Sup. 206;

American Jur., Vol. 21, pp. 439-45, sec. 128, p. 451;

Scott v. McNeal, 154 U.S. 34-46 & 50;
Continental Trust Co. v. Nobles, 30 N.Y. Sup. 994;
In re Martin Estate, 31 Cal. App. (2d) 680; 88 P. (2d) 755;
Estate of Agour, 165 Cal. 427;
Morgan v. Dodge, 44 N.H. 255;
Hinkle v. Eichelberger, 2 Pa. 483;
Carr v. Illinois C. R. Co., 43 L.R.A. 634-635.

III. Laches and Statute of Limitations do not run against fraud until discovery of the fraud.

Broderick's Will, 83 U. S. 503.

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4. THE COMPLAINT ALLEGES FACTS WHICH SHOW THAT DEFENDANTS HOLD PROPERTY IN PRIVITY WITH PLAINTIFFS.

One holding in privity of title with another will not be permitted to plead neglect or laches of that other in asserting and taking possession of his interest, in such cases he will be held to be a trustee for the other.

Nease v. Coal and Coke Rwy. Co., 195 Fed. 987-997;
West v. Evans, 29 Cal. (2d) 414, 175 Pac. (2d) 219 at p. 221;
Faubel v. McFarland, 144 Cal. 717, 78 Pac. 261.

5. **THE COMPLAINT ALLEGES THAT THE DECREE OF DISTRIBUTION IS VOID UPON ITS FACE FOR THE FOLLOWING REASONS.**

It shows on its face that it was a partial distribution in that $816.00, accounted for and in the hands of the administrator was not distributed by the decree and was not distributed by the omnibus clause, which distributed the unknown property of the estate. The omnibus clause in the decree of distribution in question does not follow the language of the usual omnibus clause in a decree of distribution and was not the recognized form of the omnibus clause in decrees of distribution. The usual omnibus clause reads, "Also all other property known or unknown or in which said estate may have any interest, is hereby distributed to," etc. The wording of the omnibus clause in question is as follows: "That the residue of said estate hereinafter particularly described and any other property not now known or discovered which may belong to said estate, or in which said estate may have any interest, be and the same is hereby distributed as follows," clearly shows that it was the intention of the Court to distribute only the residue of said estate thereinafter particularly described and any other property unknown in which the estate may have any interest, and that it was not the intention of the Court to distribute millions of dollars worth of property known to the administrator and which he concealed from the Court. (R. 59; R. 9, Par. 19.) That $816.00, shown on the face of the decree to be in the possession of the administrator was not included in the property specifically described and no disposition was made in said

decree of the $24,940,592.29 known to the administrator as shown by the inventory and appraisement. (R. 9, Par. 19 "B" Sub. Sec. F. & G.)

6. The decree is void upon its face for the reason the Court failed to find who were the heirs of Mark Hopkins, deceased, but distributed the property to "parties interested" and failed to find that the "parties interested" were the parties entitled thereto. (C. C.P. Sec. 1666. (R. 59).)

7. That the decree of distribution shows on its face that it is void in that all of the real property of the estate of Mark Hopkins, deceased, was distributed to Mary Frances Sherwood-Hopkins solely upon the agreement entered into between Mary Frances Sherwood-Hopkins, Moses Hopkins and Samuel Hopkins (Samuel Hopkins not a brother of Mark Hopkins) without a finding of heirship or that Moses Hopkins and Samuel Hopkins were entitled to any part of said estate. (R. 59.)

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8. THE COMPLAINT ALLEGES THAT THE DECREE OF DISTRIBUTION IS VOID BY REASON OF THE EXTRINSIC FRAUD PERPETRATED BY THE ADMINISTRATOR.

The decree of distribution is void for the reason it shows on its face that Moses Hopkins was administrator of said estate. He therefore occupied a vital relation to the seven Brothers and Sisters, predecessors of plaintiffs, and being a brother and acting as their personal representative and trustee, assumed a legal duty to make full disclosure to the Court and to those heirs, his seven Brothers and Sisters, as to the nature,

extent and character of said estate, and fully inform them of their rights in the premises, to the end that their rights may be fully protected, and to see that those and those only entitled to share in the estate, did so. He failed to do so as shown on the face of the decree of distribution, but on the contrary represented to the Court that he and Mary Frances Sherwood-Hopkins were the only parties interested in said estate, and fraudulently caused the whole of said estate to be distributed to said administrator and Mary Frances Sherwood-Hopkins, without any finding that they were entitled thereto, as alleged in the complaint. (R. 59, Par. 19, Sub-Sec. M.)

Dimond v. Connolly, 251 Fed. 234;

American Law Institute Restatement of the Law, Sec. 12, pp. 69-70;

Zaremba v. Wood, 17 Cal. App. (2d) 309, 61 Pa. (2d) 976.

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9. VOID DEEDS AND CONVEYANCES.

The complaint alleges that the deeds marked Exs. "B", "C" and "D" set out in plaintiff's complaint R. 53-55 & 61 are void on their face in that they show they were made without an order or confirmation of the Probate Court, under section 1517 C.C.P. of California in effect in 1879.

11 Cal. Jur., p. 832, Sec. 494;

Wells Fargo & Co. v. McCarthy, 5 Cal. App. 301, 90 Pac. 203;

Horton v. Jack, 115 Cal. 29, 46 Pac. 920;

Wickersham v. Johnston, 104 Cal. 407, 38 Pac. 89;

Bovard v. Dickenson, 131 Cal. 162, 63 Pac. 162;

11 B Cal. Jur. Sec. 684, 685, 686;

1555 C.C.P. in effect at the time the deeds were made;

1517 C.C.P. in effect at the time the deeds were made.

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10. THE FACTS ALLEGED IN THE COMPLAINT STATE A CAUSE OF ACTION BASED UPON EXTRINSIC FRAUD.

The complaint alleges that Mark Hopkins died intestate, that his father and mother were dead, that the plaintiffs are the descendants and heirs of seven brothers and sisters of decedent; that the brothers and sisters were the heirs at law of Mark Hopkins, deceased, that the brothers and sisters are now dead; that the plaintiffs are the next of kin and entitled to the interest of their predecessors in the property described in the complaint; that a fiduciary relation existed between the administrator and predecessors of plaintiffs; that the order appointing Moses Hopkins administrator and the decree of distribution are void for the following reasons:

a. That Moses Hopkins, at the time of filing the petition for letters of administration knew the names, ages and residences of the heirs of the decedent but did not state them in his petition for letters of administration, nor were the names, ages and residences of the heirs afterwards proven in the course of adminis-

tration (Sec. 1731, C.C.P. Cal., in effect at the time of the probate proceedings), as shown on the face of the decree.

b. That Moses Hopkins knowingly and wilfully, concealed from the Court and from the clerk thereof the names and addresses of said legal heirs; that by reason of said fraud, the said heirs received no notice thereof either directly or indirectly and never knew of said hearing; that the decree of distribution shows on its face that Moses Hopkins failed to furnish the Court the names and addresses of said heirs.

c. That Moses Hopkins, administrator of said estate, prior to the first day of November, 1883, applied to said Court for a decree of settlement of account and distribution, and omitted therefrom the property of said estate described in the complaint and appraised in said estate as of the value of $24,940,592.29; that plaintiffs' ancestors, the legal heirs of Mark Hopkins, did not receive any notice, legal or otherwise, of said petition for settlement of account and petition for distribution, or of the time and place of the hearing thereof and never knew of said hearing of said account and petition for distribution, and never knew that said purported decree of distribution had been ordered or made or entered.

d. That when one of the heirs learned of the death of Mark Hopkins and wrote for information relative to the estate, he received a reply from Moses Hopkins stating that his brother had died leaving a wife and nine children; and to another heir, Moses Hopkins

wrote that his brother Mark Hopkins had died and willed all of his estate to him, the said Moses Hopkins; that said heirs believed the statements of Moses and relied thereon. That the ancestors of plaintiffs lived more than three thousand miles from California.

12 *Cal. Jur.*, p. 762, Sec. 36 and p. 758, Sec. 34 (and cases cited.)

11. That Moses Hopkins represented to the Court that Mary Frances Sherwood-Hopkins was the only person interested in said estate except the administrator. That said complaint further alleges that Mary Frances Sherwood-Hopkins was not the wife of the decedent, nor an heir, nor entitled to said estate or any part thereof; neither was Samuel F. Hopkins an heir entitled to any part of said estate.

12. That the personal property set out in the decree of distribution except the sum of $895,078.01 cash in the hands of the administrator was non existent at the time of the death of Mark Hopkins; and that stocks of the Southern Pacific Company and Central Pacific Railroad Company had been issued to Mark Hopkins in lieu thereof, all of which was known to said administrator and was not accounted for nor distributed in said decree; that prior to and at the time of filing of said report by said administrator and the signing of the decree, the administrator, Moses Hopkins knew of and had in his possession assets, cash in hand, stocks and bonds, and other property unreported and undistributed by said decree, to wit (particularly described R. 13, Pars. F and G), of the

value of $24,940,592.29; that said Moses Hopkins as such administrator, failed and neglected to account for any of said personal property last above described, and concealed the same from the Court. (R 9, Par. 19.)

13. That Mary Frances Sherwood-Hopkins and said administrator, Moses Hopkins, conceived and formed the purpose of deceiving the Court and in pursuance of said fraudulent intent and scheme, withheld and concealed from the Court at the time of the settlement of said account and distribution of said estate, the fact that said deceased had left property other than that reported. That the property reported was a minor portion of said estate; and Moses Hopkins, in his account of said estate and in his petition for distribution therein, falsely and fraudulently represented to the Court that the deceased had no interest in or to any other property except that reported, with the intent to deceive said Court and to defraud the heirs of said deceased, and failed to report the proceeds from the purported sale of the real property that had been sold and transferred by said administrator and administratrix without an order or confirmation of the Superior Court. (R. 9 to 20, Par. 19.)

14. That at and during the whole period of probate of said estate the brothers and sisters, the heirs of said deceased, other than Moses Hopkins, were not residents of the state of California, and were absent therefrom and none of them had any notice or knowledge and never knew of the false and fraudulent acts of said administrator. (R. 21, Par. 22, R. 25, Par. 29.)

15. That by reason of the facts alleged in the complaint the brothers and sisters of Mark Hopkins, whose descendents are the plaintiffs, were deprived of their property and vested interest in the estate of Mark Hopkins, deceased, without due process of law. (R. 20, Par. 20.)

Articles V and XIV, U. S. Const.;

Article I, Section 13, Cal. Const.

Civil Code of Cal. Sec. 1386, sub. div. 2, in effect in 1878, provided:

"If decedent leaves no issue nor husband, nor wife, the estate must go to his father, if there be no issue, nor husband nor wife, nor father, then equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister by right of representation."

Freeman on Judgments, Vol. 3, sec. 1234, p. 2572;

Bailey v. Glover, et al., 88 U.S. 342;

Pickens v. Merrim, et al., 242 Fed. 363;

Rosenthal v. Walker, 111 U.S. 188;

Griffin v. Godey, 113 U.S. 89;

Lataillade v. Orena, 91 Cal. 565, 27 P. 924.

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16. THE COMPLAINT ALLEGES THAT $24,940,592.29 WAS FRAUDULENTLY CONCEALED AND WITHHELD FROM THE COURT.

The settlement of an administrator's account by a decree of a Probate Court does not conclude as to property accidentally or fraudulently withheld from the Court. If the property is omitted by mistake

or be subsequently discovered, a Court of Equity may exercise its jurisdiction in the premises and take such action as justice to the heirs may require, even if the Probate Court might, in such cases open its decree and administer upon the omitted property, and a fraudulent concealment of property or a fraudulent disposition of it, is a general and always existing ground for the interposition of equity.

Griffith v. Godey, 113 U.S. 89; 28 Fed. 934;
Bailey v. Glover, 88 U.S. 342; 22 L.Ed. 636;
Rosenthal v. Walker, 111 U.S. 185; 28 L.Ed. 395;
Freeman on Judgments, p. 2572;
Lataillade v. Orena, 91 Cal. 565; 27 Pac. 924;
25 *Amer. State Reports,* 219;
Pickens v. Merrim et al., 272 Fed. 363.

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17. DISCOVERY.

The complaint in this action alleges that neither plaintiffs nor their ancestors discovered the fraud set out in the complaint (R. 21, par. 22, p. 25, par. 29) until 1945, and there was no evidence on the motion to dismiss that they ever knew of or had reason to believe that the property set forth in the complaint had been fraudulently concealed by the administrator or that such property ever existed until 1945. The only evidence on the motion to dismiss and upon which the Court of Appeals based its findings that the plaintiffs or their ancestors knew of the fraud, was the affidavit of Estelle Cochran Latta, one of the appellants, in which she stated that

her father learned in 1925 that Mark Hopkins was never married, and the affidavit by Jones Griffin the statement, that about the year 1925 affiant and other heirs of Mark Hopkins in North Carolina first learned that Mark Hopkins had died intestate and left no wife and children and left an estate. The fact that they discovered that Mark Hopkins had died without leaving a wife or children does not show that they knew of or had reasons to believe prior to 1945, that a fraud had been committed by Moses Hopkins by which he concealed the millions of dollars alleged in the complaint or that they knew prior to 1945, that the property described in the complaint existed, but said affidavits do say that the heirs of Mark Hopkins and the plaintiffs herein did not discover and had no knowledge of the existence of the facts alleged in the complaint until 1945, and that their predecessors never knew of the existence of said property.

For these reasons, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit should be granted.

Dated, Sacramento, California,
May 4, 1949.

BUSICK & BUSICK,
CHARLES H. SECCOMBE,
S. J. BENNETT,
CARLYLE HIGGINS,
JAMES D. MEREDITH,
Attorneys for Petitioners.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. .....

ESTELLA LATTA, JONES M. GRIFFIN and ALVIN CHAMBERS,
Petitioners,

vs.

WESTERN INVESTMENT COMPANY (a corporation), et al.,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of facts set out in petition, p. 2-6.

Opinion of United States Court of Appeals, Record, page 210.

THE PRINCIPLES OF LAW INVOLVED IN THIS CASE ARE FUNDAMENTAL.

1. That when a man dies intestate, the title to his property vests in his heirs.

2. One heir cannot convey the interest of other heirs.

3. Where one holds in privity of title with another, he will not be permitted to plead the neglect or laches of the other in asserting and taking possession of his interest, in such cases he will be held a trustee for the other.

(In the instant case the plaintiffs and the defendants are tenants in common in both the real and personal property of the estate of Mark Hopkins, while the defendants may not be the original holders of title, they took with notice of the defects appearing on the face of the instruments purporting to convey title.)

4. If a decree or judgment is procured by fraud, an action to correct the wrong, is a direct attack, but it may be attacked either directly or collaterally.

5. If a judgment or instrument is void by reason of defects appearing upon its face, or that it was rendered in excess of the Court's jurisdiction, it is no judgment at all, by it no rights are divested, from it no rights can be obtained, it is worthless in itself, all proceedings founded on it are worthless, it neither binds nor bars anyone, all acts performed under it, and all claims growing out of it are void, it is as a dead limb on a tree that may be chopped off at any time, laches and limitations do not affect it, and it may be attacked either directly or collaterally.

6. Plaintiffs' interest in the property of the estate having been taken without legal notice or representa-

tion, they have been deprived of their property without due process of law.

7. Moses Hopkins having been convicted of an infamous crime his appointment as administrator was in excess of the jurisdiction of the Probate Court and is absolutely void, and all acts performed by him are void.

8. Upon the facts alleged in the complaint which are admitted for the purpose of this motion, the plaintiffs are entitled to their day in Court.

9. When one is appointed administrator he is in equity a trustee for the heirs, his duty is to protect the interest of his cestuis que trust, and he owes a solemn duty to make full disclosure of all the facts to said parties whom he represents as well as to the Court, and to see that those and only those entitled to share in the estate do so.

10. Silence under some circumstances may be excusable, but where there is a trust relation there is a solemn duty to speak and a failure to do so, is a fraud of the most serious nature.

11. Where an administrator knew the rights of interested parties and concealed from them and the Court, property belonging to the estate, this constituted a fraud upon them as well as the Court. Equity may reopen on the grounds of fraud, although the statute declares the decree of accounting final and conclusive.

12. An administrator cannot contract with himself as an individual in respect to property of the estate,

or profit by a decree of distribution in favor of himself obtained by fraud.

13. If the order appointing Moses Hopkins, a person, by statute made incompetent to act as administrator, was in excess of the Court's jurisdiction, and void, then the doctrines of laches and statute of limitations do not apply, and plaintiffs are entitled to their day in court.

14. If the facts alleged in the complaint are true, and by the motion to dismiss they are admitted for the purpose of the motion, then the facts alleged show that the complaint is not subjected to the doctrine of laches or the statute of limitations.

In *Carrell v. Hotel Co.*, 149 Fed. (2d) 404, the Court said:

> "A complaint should not be dismissed unless it appears certain the plaintiff is not entitled to relief under any state of facts which could be proved regardless how likely it may seem plaintiff will be able to prove his case. Ordinarily on a defendant's motion to dismiss court may consider only allegations of complaint which alone are taken as true."

It is admitted that 64 years have elapsed since the signing of the purported decree. It is also admitted that the original records in the probate proceedings were destroyed by the fire in 1906, which is one of the vital reasons of the delay in the commencement of this action, but the necessary records in the case upon which the plaintiffs and defendants must rely were recorded elsewhere in the state, and the plain-

tiffs have furnished the defendants copies attached to the complaint.

It is also admitted that the lips of those charged with fraud are closed in death, but they left foot prints in the sands of time, of their fraudulent acts which have lived after them; a fraud that was purposely wrapped in secret and kept from the heirs who lived three thousand miles from the scene of action, and who were handicapped in their investigation by the death of the parties and the destruction of the records. This fraud was conceived and planned, and runs through the entire administration of the estate, as the records disclose.

It is admitted that the property has passed into the hands of others. This brings us to the vital question: who should suffer, the parties who have been victimized by reason of the fraudulent acts of those who knowingly perpetrated the fraud on the brothers and sisters of Mark Hopkins, and their descendants, or those who came into possession of the property in the face of the records with constructive notice, such as, the decree of distribution which was recorded in every county in the state where the deceased had property; (Ex. A.) the deeds on record that did not convey title out of the estate. The deed from Moses and Samuel to Mary Frances, attempting to convey all their interest while she was acting in a fiduciary capacity as administratrix; (Ex. B.) the deed from Mary Frances, Moses and Samuel to Huntington, et al., also executed during the purported administration of Mary Frances, signed by her indi-

vidually and without an order or confirmation of the Court, and before the debts of administration were paid; (Ex. C.) and the deed to the Ione Coal and Iron Co. (Ex. D.) These documents void on their face were recorded and were notice to the world. Time, even 64 years under the circumstances and facts alleged in the complaint, should not be permitted to defeat the rights of the plaintiffs; and the greatest fraud ever perpetrated in the State, should not be condoned by the Courts. The deeds "Ex. B, C & D" R. 53, 55, 61 only purported to convey the interest of the grantors in the property described; in short were only quit-claim deeds and conveyed only such interest as the grantors therein had, and did not pass any title vested in the other seven brothers and sisters of Mark Hopkins.

ASSIGNMENT OF ERRORS.

1. The Court erred in holding that the appointment of Moses Hopkins, as administrator, a person previously convicted of an infamous crime, and declared by the statute of California, incompetent to act as administrator, is valid by reason of lapse of time; and that "upon his appointment the letters of administration issued to him became conclusive of his qualification and authority to act and the regularity of the proceedings leading up to his appointment." (Record p. 218.)

2. The Court erred in holding that the plaintiffs attack on the appointment of Moses Hopkins, a per-

son previously convicted of an infamous crime, is a collateral and not a direct attack. (R. 218.)

3. The Court of Appeals erred in its statement that the plaintiffs claim that the decree of distribution is void for three reasons only; (R. 216), whereas the complaint assigned eight reasons why the decree is void, and the Court refused to find upon "numerous other points raised by the parties." (R. p. 216.)

4. The Court of Appeals erred in failing to find upon 6 of the material issues raised by the complaint, Viz:

I. That the decree of distribution is void upon its face for the failure of the Court to find who were the heirs of Mark Hopkins, and distributed the estate to parties "interested." (R. 9.)

II. That the decree is void on its face in that the Probate Court attempted to distribute the real property of the estate pursuant to a contract entered into by Moses Hopkins, Samuel Hopkins and Mary Frances Sherwood-Hopkins without a finding of heirship or that the parties to the contract were all the heirs of Mark Hopkins entitled to any portion of the estate. (R. 15.)

III. That the decree of distribution is void for the reason that Moses Hopkins, while acting in a fiduciary capacity as trustee of the heirs of Mark Hopkins, concealed from the Court the facts as to heirship, as appears on the face of the decree. (R. 18 to 20 inc.)

IV. That the decree of distribution is void by reason of extrinsic fraud perpetrated by the administrator. (R. 18, 19.)

V. That the decree of distribution is void, by reason of a breach of trust on the part of the administrator in failing to disclose to his brothers and sisters, heirs of Mark Hopkins, the nature, extent and character of said estate and to fully inform them of their rights in the premises, and to protect the interest of the cestui que trust. (R. 18 to 20 incl.)

VI. That the decree of distribution is void in that the administrator, in reporting the assets of the estate included property not in existence, and concealed from the Court, $24,940,592.29, of the property of the estate known to and in the possession of the administrator. (R. 11 to 15 incl.)

5. The Court of Appeals in its statement that "the pleadings recognized the appointment of Moses Hopkins as administrator," the pleadings admit the order appointing Moses Hopkins as administrator, but challenge the legality of such appointment. (R. 218.) (R. 80.)

6. The Court of Appeals erred in holding that the decree of distribution distributed the entire estate of Mark Hopkins deceased. (R. 219.)

7. The Court of Appeals erred in holding that the complaint is barred by the provisions of sec. 338 of California Code of Civil Procedure. (R. 227.)

8. The Court of Appeals erred in holding that appellants have had actual knowledge of the alleged fraud for over twenty years. (R. 228.)

9. The Court of Appeals erred in holding that the claims of plaintiffs are stale and are barred by laches as well as the statute of limitations. (R. 216.)

10. The Court of Appeals erred in holding that under the provisions of sec. 1666 of the California Code of Civil Procedure, such order or decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside, or modified on appeal. (R. 221.)

11. The Court of Appeals erred in holding that the decree of distribution is valid and distributed the entire estate. (R. 216.)

12. The Court of Appeals erred in holding that the decree was a final decree and not a decree of partial distribution. (R. 220.)

13. The Court of Appeals erred in holding that the deeds executed prior to the appointment of Moses Hopkins as administrator of the estate, which sales were made without an order of or confirmed by the Court, and the proceeds of the sale were not accounted for in the estate of Mark Hopkins, were valid. (Op. R. 223.) (Ex. C & D, Rec. PP. 55 & 61.)

14. The Court of Appeals erred in citing the case of *Freeman v. Hopkins et al,* 32 Fed. 2d 756, (Record P. 215) as affecting the issues in this case. The facts and the law of that case have no application to the facts alleged in petitioners' complaint in this case and the law governing the same, in that the issues and property involved are not the same.

15. That the Court of Appeals erred in dismissing this action based on void judgments, void deeds and void order appointing the administrator, to which judgments and orders laches and limitations do not apply.

16. That the Court of Appeals erred in failing to find upon the issue that the plaintiffs have been deprived of their property without due process of law, raised by the pleadings. (R. 20, Par. 20.)

17. The Court of Appeals erred in rendering a summary judgment for the reason the pleadings, affidavits and admissions on file show there is a genuine issue as to every material fact alleged in the complaint and that the moving party was not entitled to judgment as a matter of law. (Rule 56 Federal Rules of Procedure.)

18. The Court of Appeals erred in finding upon the merits of the allegations of the complaint without receiving any evidence in support of or against the allegations of the complaint alleging the invalidity of the order appointing Moses Hopkins, or of the facts constituting extrinsic fraud as alleged in the complaint.

19. The Court of Appeals erred in finding upon the issue of laches and the limitations of actions based upon the admission of evidence on such issues, and in passing judgment upon the merits of other material issues and allegations of the complaint not affected by laches or the statutes of limitations.

20. The evidence is insufficient to sustain the judgment of the court in dismissing the action.

ARGUMENT.

The Court of Appeals erred in its decision holding that plaintiffs' action is a collateral attack upon the proceedings and judgment in question in the estate of Mark Hopkins deceased. This action is a direct attack upon the appointment of the administrator Moses Hopkins, the said deeds and the decree of distribution. The Court of Appeals on R. page 218 of its decision paragraph two stated: "they may be attacked only in direct proceedings and not collaterally", thereby judicially recognizing that if this were a direct attack the complaint states a cause of action.

This is a direct attack upon the order appointing the administrator, the said deeds and the decree of distribution on the grounds of excess of jurisdiction, and extrinsic fraud in procuring the same, and not a collateral attack. In *Borg v. Borg,* 76 Pac. (2d) 218 at 221, the Court said: "the cases are also in harmony on this point; an attack upon a judgment upon the ground that it was procured by fraud or mistake, is a direct attack". In *Fisher v. Superior Court,* 294 Pac. 445, 110 Cal. App. 565, quoting *Parson v. Weis,* 144 Cal. 410-419, 77 P. 1007, the Court said: "An attack upon a judgment on the grounds that it was procured by fraud is a direct attack, since *the establishment of the fraud shows that no judgment has been rendered".* Citing *U. S. v. Throckmorton,* 98 U.S. 61-65, wherein the Court said: "That in those cases wherein the attack upon a judgment is to be sustained on account of the character of the fraud employed, the Court proceeds upon the general doctrine that

fraud vitiates the most solemn contracts, documents and even judgments". * * * "In the proceeding to set aside the judgment on the grounds mentioned and to secure separate maintenance the Court is clothed with the same jurisdiction as though no decree had been rendered". In *Bergin v. Haight,* 99 Cal. 52, 33 Pac. 760, the last case above was cited with many others and the rule upheld.

THE APPOINTMENT OF MOSES HOPKINS VOID.

ASSIGNMENT OF ERROR NO. 1.

The Court of Appeals treats lightly the allegation of the complaint (R. page 80) that Moses Hopkins was convicted of an infamous crime prior to his appointment as administrator, and that such appointment was void because the California Code specifically provided that such a person was incompetent to act as administrator and the Court states, "if such were the rule of law no link in a chain of title dependent upon a probate proceeding could or would be relied upon, thereby rendering virtually all titles subject to attack whenever some dissatisfied person feels inclined to expose his family skeleton to the world" (Record 218); but cites no authority to support such statement. In the face of the statute sec. 1369 Code of Civil Procedure of California in effect in 1878, at the time of the death of Mark Hopkins, and in 1881 at the time of the appointment of Moses Hopkins as administrator, and now sections 401 and 420, Probate Code, which provides *that no person is competent or*

entitled to serve as administrator who is convicted of an infamous crime. The Court of Appeals ignores the statute and by its *ipse dixit* overrides the express prohibition of the statute. Under the statute above cited the appointment of Moses Hopkins, a person previously convicted of an infamous crime was void and the lapse of time, referred to by the Court, cannot validate a void order or judgment, made in excess of the jurisdiction of the Court.

> "Probate proceedings being purely statutory, and therefore special in their nature, the Superior Court although a court of general jurisdiction, is circumscribed in this class of proceedings by the provisions of the statute conferring such jurisdiction, and may not competently proceed in a manner essentially different from that provided". *Bales v. Superior Court,* 21 Cal. (2d) 17, 129 P. (2d) 685-689.

In *Smith v. Westerfield,* 88 Cal. 374-379, 26 Pac. 206-207, the Court said:

> "Although it is a court of general jurisdiction, yet in the exercise of those powers its jurisdiction is limited and special; and whenever its acts are shown to have been in excess of the powers conferred upon it or without the limits of this special jurisdiction, such acts are nugatory, and have no binding effect, even upon those who have invoked its authority or submitted to its decision".

The Court of Appeals further erred in holding that upon his appointment the letters issued to him became conclusive of his qualification to act, and the regular-

ity of the proceedings leading up to his appointment. This is not the law where the Court exceeds its jurisdiction, or where the decree is void, or where there is an extrinsic fraud in procuring the judgment, or where there is fraud in concealing the facts or property from the Court. In such cases the adjudication by the Probate Court is not conclusive.

In *Johnson v. Superior Court,* 77 Cal. App. 599, 247 Pac. 249-250-251, the Court said:

> "Thus, in the exercise of the powers conferred upon it, its jurisdiction is limited, and special, or limited and statutory, in the sense that its jurisdiction is limited by the mode of procedure prescribed by the statute. Not only by the character and extent of the jurisdiction, but the procedure by which that jurisdiction may be invoked, are under legislative control; and that procedure must be followed, or relief under the jurisdiction cannot be secured. It is said that the Code is the chart and compass of the Court, which cannot amplify its jurisdiction nor arrogate to itself any power beyond that given it by the statute. And whenever the acts of the Court are shown to have been in excess of the power conferred, such acts are nugatory and have no binding effect even upon those who have invoked its authority or submitted to its decision". (Citing 11 Cal. Jur. pp. 34-35.)

Although the jurisdiction over the subject matter of the estate authorized the appointment by the Court of an administrator, yet, since provisions of the Code of Civil Procedure provided the exclusive method for

the exercise of such authority, the appointment of a person prohibited by provisions of C.C.P. sec. 1369, was in excess of the Court's jurisdiction.

American Jur. Vol. 21, p. 439:

"Although the conclusive effect of a judgment of Probate and other Courts exercising similar powers upon matters within their jurisdiction is generally maintained in the several states, yet if the Probate Court having jurisdiction over certain subject matter clearly exceeds its powers, or does acts prohibited by law, its decree may be avoided in a collateral proceeding as well as by appeal".

Ibid. at page 450, sec. 128:

"In case where the Court granting letters of administration has no jurisdiction, * * * the Courts have generally held the acts done by such administrator absolutely void, *irrespective of lapse of time*".

Ibid, at page 451:

"In some jurisdictions, the view prevails that the appointment of an ineligible person as administrator is void, and in consequence his acts in an official capacity are also void".

In *Knox v. Nobles,* 28 N.Y. Sup. 355, the Court said: The main question involved in this appeal, is whether letters of administration issued by the surrogate to a minor are or are not void.

"The statute expressly prohibits the granting of letters to a person convicted of an infamous crime, or to one incapable of making a contract, or to a

person under the age of 21 years. Can it be said that the surrogate by his *ipse dixit,* can repeal the statute, it being manifest that the question of eligibility of the person proposed to be appointed administrator is not one of the jurisdictional facts? It would be a monstrous proposition to hold that a judicial officer can by his mere will override the express prohibition of the statute".

"The right of the surrogate in the case at bar to appoint an administrator could not be attacked collaterally, but when he selects a person whom the statute says he shall not appoint as such administrator, after having determined to appoint such an officer, his act is absolutely void. A decree granting letters of administration to an infant is void, and may be attacked on that ground in a collateral proceeding".

"It seems therefore, reasonably clear that the appointment by the surrogate of the plaintiff was void, and that the contract as far as the plaintiff attempting to bind the estate of her husband was also void. But it is a familiar principle that a person attempting to enter into a contract in a representative capacity having no authority to enter into such contract in such capacity, is bound individually."

In *Knox v. Nobles,* 27 N.Y. Sup. 206 (head note no. 1): "A decree granting letters of administration to an infant is void, and may be attacked on that ground in a collateral proceeding".

At page 207 the Court said: "The question is whether or not the letters of an administrator issued by the surrogate to the plaintiff when she was an infant conferred any authority upon the plaintiff to act as administrator; In other words, whether or not such letters were actually void when they attempted to constitute a person who was incapable of becoming an administrator".

The defendant contended, that the surrogate having granted the letters adjudicated all facts necessary to sustain the granting letters and was conclusive as to the appointment and the competency of the person and could not be attacked collaterally. The Court said, that would be true so far as applies to any fact necessary to be adjudicated upon by the surrogate after he had acquired jurisdiction of the parties and the subject matter. That however, is not the question here, it is whether or not a person who was deemed by the law incapable of acting or making any contract, can be, by decree of the surrogate clothed with full power to act. (Then the Court refers to the appointing of a dead man or an insane person.) "Could it be claimed that those letters were valid and the estate bound by any acts of the lunatic, because he was acting as administrator?" (In conclusion the Court said) page 208: "so, an infant cannot be appointed an administrator or executor".

(Paraphrase.) The Court further stated, that the appointment of an infant is absolutely void because the person was incapable by law from acting. His acts

would not bind him or the estate, the letters being void when granted. In order to constitute an administrator a reappointment was necessary after disability removed, that there were no valid letters issued and no legally appointed administrator of the estate, that the appointment could be declared void because she was not legally appointed.

In *Continental Trust Co. v. Nobles,* 30 N.Y. Sup. 994, the Court said:

> "Since the decision in general terms of this court in Knox v. Nobles, in which the validity of the appointment of the intestate's widow as administratrix was in question, it is settled that the act of the Surrogate in issuing letters to the widow was void, as she was then a minor, and that any contract made by her as administratrix, so far as it attempted to bind the estate of her husband, was also void.
>
> The letters that the Surrogate Court issued which attempted to appoint testator's widow as administratrix being void, there was no representative of the estate, with whom the defendant could deal, or make any contract that would bind the estate. The bill of sale that he received from the widow was therefore an absolute nullity, so far as the estate was concerned; and the plaintiff having been duly appointed administrator and being in position to enforce the rights and obligations of the estate is clearly entitled to require the defendant, as surviving partner to account for the co-partnership property in his hands."

In re Martin Estate, 31 Cal. App. (2d) 680, 88 Pac. (2d) 755: In this case, the heirs of Martin brought

suit to recover an estate that had been ordered by the Court escheated to the state. The Court said that the Probate Court had exceeded its jurisdiction and that the decree was void. The Court said:

> "It is our opinion that * * * the court had no power or jurisdiction to distribute the estate to the State of California. Such decree, is in excess of jurisdiction, is void. Excess of jurisdiction, as distinguished from the entire absence of jurisdiction, means that the act, although within the general power of the judge, is not authorized and therefore void, with respect to the particular case, because the condititons which alone authorize the exercise of his general power in that particular case are wanting and hence, the judicial power is not in fact lawfully invoked." (Citing 15 *C. J.* 729, par. 24.)

Estate of Agoure, 165 Cal. 427, 132 Pac. 587.

In this case, the widow of a deceased had applied for letters of administration. A creditor interposed with a contest and petition for letters. The petition charged the widow with having entered into a conspiracy to murder her husband. The Court said that the petitioner knew or should have known, that Section 1409 of the Civil Code declared that no person who has been convicted of murder of the deceased shall be entitled to succeed to any portion of the estate, and that Section 1369 of the Code of Civil Procedure declares that no person is competent as executor or administrator who has been convicted of an infamous crime.

In *Carr v. Illinois C. R. Co.,* 43 L.R.A. (N.S.) 634-635, the Court said: "The question of the validity of the acts of an administrator arises in two classes of cases: those in which the appointment is absolutely void, in which case the acts of the administrator are a nullity, forming one class; and cases wherein the appointment was merely voidable, in which case acts done in good faith prior to the revocation of and pursuant to the power granted by the letters, have, in general, been considered valid and binding upon the estate, forming the second class. Such appointment is void."

Freeman on Judgments, 4th ed., Section 117, says:

> "A void judgment is, in legal effect no judgment, by it no rights are diverted, from it no rights are obtained, worthless in itself, all proceedings founded on it are equally worthless, it neither bars or binds any one, all acts performed under it and all claims growing out of it are void."

See

Freeman, 5th ed., Vol. I, Section 278.

In *Scott v. McNeal,* 154 U.S. 34, at pages 46 and 50, the Court said:

> "No judgment of a court is due process of law, rendered without jurisdiction of the court, or without notice to the parties."
>
> (p. 50.) "In a case decided in the District Court of the United States for the Southern District of New York, in 1880, above cited, Judge Chote, in a learned and able opinion, held that letters of administration upon the estate of a living

man, issued by the Surrogate after judicially determining that he was dead, was null and void as against him, that the payment of a debt to an administrator so appointed was no defense to an action by him against the debtor; and that to hold such administration to be valid against him would deprive him of his property without due process of law, within the meaning of the 14th Amendment of the United States Constitution".

None of the cases cited by the Court of Appeals in its opinion are in point, none of them refer to an appointment of any person who was prohibited by statute where such person was ineligible under the law to act as administrator; and all of the cases cited by the Court were collateral attacks upon the appointment based upon some informality in the proceedings and not upon the grounds of extrinsic fraud in procuring the appointment or where the judgment of the Court was in excess of jurisdiction in making an appointment prohibited by law. The holding of the Honorable Court of Appeals on this point is clearly judicial legislation.

In *California Jur.*, Vol. 7, Sec. 37, page 626, it is said:

"*Duty of Office of Courts Generally.* A court determines existing rights, but does not create new rights by the exercise of an uncontrolled volition. In other words, the obligation of courts is to declare the law as it exists; they have no right to substitute their own dogmas or assumption for the law. It has been said that 'Judicial legislation is, as a rule, the worst of legislation. It is

almost invariably the offspring of some real or supposed hardship which may result from the decision of the particular case in hand in accordance with existing laws or well established rules of procedure.' "

Courts cannot make or repeal a statute, for where the law is plain, it is the duty of the court to enforce it, leaving questions of policy or expediency for the consideration of the legislature and the people. For instance, the consideration of a decision will put the Legislature to inconvenience does not justify a court in overriding a positive constitutional provision. It has been said that the court cannot consider the apparent justice or hardship of the operation of the law in particular cases, for by so doing it might establish a principle that would cause greater injustice or greater hardship in numerous other cases.

In *Somers v. Somers,* 81 Cal. 608, 22 Pac. 967-968, the Court said:

"Judicial legislation is, as a rule, the worst of legislation. It is almost invariably the offspring of some real or supposed hardship which may result from the decision of the particular case in hand in accordance with existing laws or well established rules of procedure. An attorney who has a plain statute before him has not followed it, but has resorted to some other means of presenting his case. The court rather than deny him a hearing on the merits, approves his course, and thereby establishes a rule of practice unknown to the Code, and hitherto unheard of, and brings uncertainty and confusion into the practice. Such

infractions of the rules of practice make bad laws, poor lawyers, and unreliable courts. Lawyers come to believe that all they have to do is to satisfy the liberal mind of the court not to comply with the law. We believe it to be a wrong to competent attorneys, an injustice to litigants."

DECREE OF DISTRIBUTION VOID.

ASSIGNMENT OF ERROR NO. 2.

1. The decree of distribution is void by reason of the facts alleged in the complaint constituting extrinsic fraud perpetrated in procuring the same (paragraphs 14, 15, 16, 17, 18 and 19, R. 6 to 20, inclusive).

Actual fraud is defined by Section 1572, Civil Code of the State of California, as:

"1. The suggestion as a fact, of that which is not true, by one who does not believe it to be true. 2. The positive assertion, in a manner not warranted by the informattion of the person making it, of that which is not true though he believes it to be true. 3. The suppression of that which is true, by one having knowledge or belief of the fact. 4. Any other act fitted to deceive."

In *Donecan v. Los Angeles,* 109 Cal. App. 683:

Neither the doctrine of laches or limitations has any application to an attack upon a judgment void for lack of jurisdiction; it is absolutely void and may be attacked anywhere, directly or collaterally whenever it presents itself either by parties or strangers; it is simply a nullity and can be

neither a basis nor evidence of any right whatever.

In *Dimond v. Connolly,* 251 Fed. 234, the Court said:

"The first point for our attention is (referring to the administrator), if his relationship was fiduciary * * * The doctrine of equity as applied by the Supreme Court calls for strict enforcement of the rule that forbids one holding in a trust relation from making private use of the trust property. * * * When one is appointed administrator he is in equity a trustee for the heirs, his duty therefore, was to protect the interest of his cestui que trust, * * * As administrator Connolly's duty was to see that those and those only entitled to share in the estate did so. The suppression of knowledge which he had was the withholding of the truth, and the motive, as set forth was his greed for personal gain. * * * In our opinion there was a trust relationship; it follows that Connolly, administrator, could not make a contract with himself as an individual in respect to property of the estate on principle. Therefore, he could not profit by a decree of distribution in favor of himself obtained by fraud (the statute), the court must name the persons and parts to which each shall be entitled.

"Under the statute it was obligatory upon Connolly as administrator to apply to the court in his representative capacity; it is too plain for argument that his duty was to advise the court in absolute good faith of all the knowledge he possessed concerning the persons who under the law were entitled to the estate; failure to do this, with intent to profit by concealment when he had

the knowledge must be regarded as fraud sufficient to make the decree recovered by the administrator a fraud against them. * * * Under the allegations of the complaint the court of equity should be reluctant to deny relief merely upon the grounds of laches."

Freeman on Judgments, Vol. 3, Sec. 1235, par. 2575.

"Where there is a duty to disclose: In ordinary situation one may, legally if not morally, keep silent and profit by his adversary's ignorance, that is neither fraud intrinsic or extrinsic. But where there is a solemn duty to speak independently of coercion, and in a judicial controversy as well, whether asked to speak or not, and there is a failure to speak, resulting in the enrichment of the wrongdoer and the impoverishment of the one to whom the duty is owing, there is a fraud of the most serious nature, and in a sense both intrinsic and extrinsic. The failure to perform the duty to speak or make confidential relations is obviously a fraud, for which equity may afford relief from a judgment thereby obtained, even though the breach of duty occurs during a judicial proceeding and involves false testimony and this is true whether such fraud be regarded as extrinsic or as an exception to the extrinsic fraud rule."

Citing

Smith v. Smith, 210 Fed. 947;

Campbell-Kawannanakoa v. Campbell, et al., 152 Cal. 201, 92 Pac. 184;

Sohler v. Sohler, 135 Cal. 323, 67 P. 282.

In the Campbell case: The administrator knew the rights of the plaintiffs and failed to make same known to the court, and concealed from the court and the heirs property that belonged to the estate. At page 208, the court said: "That the acts of the defendants constituted a fraud upon plaintiffs as well as the court," * * * That the proceedings were a mere sham, a scheme devised and carried into effect by the defendants. Page 209, "In view of what has been said, it is apparent that even if it be assumed that the order of distributing the purported proceeds was an adjudication by the Superior Court of the validity of the trust which is not collaterally assailable such adjudication will not bar this proceeding if it was obtained by fraud of such character as will warrant the exercise of the well settled equitable jurisdiction."

At page 210 the court further said: "Where the complaint alleges the proceeding was a sham, and was contrived to give the appearance of legality was nothing but taking property without consideration and authority of law, carried through by means of false representations and concealment from the court the real facts, such imposition upon the court to the injury of the property owners by one who was trustee for the proper administration of the affairs of the estate and the preservation of the property for legal distribution clearly constituted under the authorities extrinsic fraud warranting equitable relief."

In the above case is found the quotation: "that there must be an end to litigation", which is taken from the *Throckmorton* case 98 U.S. 65, in which the court said:

"The reason for the rule is that there must be an end to litigation: When parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviving such determination in the same proceeding, it must be regarded as a final conclusion unless it can be shown that the jurisdiction of the Court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy."

In *Larabee v. Tracy,* 39 Cal. App. (2d) 593, after holding that the party was misled and kept away from Court, and no notice was given other than by publication, the Court said, page 599: In all these cases and many others which we have examined, relief has been granted on the grounds that by some fraud practiced directly upon the party seeking relief against the judgment or decree that party has been prevented from presenting all his case to the Court, this definition has become the well recognized standard definition of extrinsic fraud.

EXTRINSIC FRAUD.

THE COMPLAINT ALLEGES FACTS ESTABLISHING EXTRINSIC FRAUD.

IT ALLEGES THAT MOSES HOPKINS, THE PURPORTED ADMINISTRATOR, IN FILING HIS REPORT, REPORTED ONLY A MINOR PORTION OF THE REAL AND PERSONAL PROPERTY OF THE ESTATE, BUT ON THE

OTHER HAND, REPORTED PROPERTY THAT WAS NOT IN EXISTENCE AT THE TIME, AS ALLEGED IN PARAGRAPH 19, subsections F and G, pages 7, 8, 9, and 10 of the complaint and failed to report millions of dollars belonging to the estate in his possession at the time of filing of his report as alleged in the complaint. This constitutes extrinsic fraud. (R. 9 through 15.)

Weyant v. Utah Savings and Trust Co., 182 Pac. 189,

citing

Goodrich v. Ferris, 145 Fed. 844.

This is a case where a husband left his wife and children and married another woman, died, the purported wife was appointed administratrix and administered on the estate. The wife and children brought suit to set it aside and upon the bond. At page 199, the Court said:

> "The administratrix so far as the respondent is concerned, acted directly contrary to and in the teeth of duty imposed by law and by the bond that is sued on. It was the duty of the administratrix under the law, to publish proper notice, so as to apprise the heirs, and all others interested in the estate of the true condition, and when she failed to do that she utterly failed to faithfully execute the duties of the trust according to law, nor did she administer the estate for the use and benefit of the heirs of the deceased as she was bound to do.
>
> Nor did the wrong committed by her occur after the decree of distribution nor when acting in a

capacity other than that of administratrix, but while acting in said capacity.

In the probate proceedings herein questioned, however, the administratrix not only failed to publish proper notice, but she utterly failed to make and return a true and complete inventory of the property belonging to the estate, she converted millions to her own use without reporting it to the court and without disclosing its existence.

That act alone constituted an insufferable fraud and manifestly constituted a breach of trust."

See *Cyc.* Vol. 18, page 1267.

"Moreover all of her acts which resulted in despoiling respondents of their inheritance occurred during the administration of the estate."

This is a direct attack on the order appointing the administrator and the purported decree of distribution based on the grounds of fraud. The rule that these questions could have been raised on appeal from the order or decree is not conclusive. This was so held in *Zaremba v. Woods,* 17 Cal. App. (2d) 309, 61 P. (2d) 976 and cases here cited, where there existed a state of facts similar to those alleged in the plaintiff's complaint, in the case at bar. In that case Woods, the executor of the estate of Zaremba, stated in his petition for probate of the will, that the deceased had no heirs, except Hugo Zaremba (as in the case at bar), who is now living and inasmuch as he is well provided for, I make no provisions for him by this, my last will.

The extrinsic fraud relied upon by the plaintiff, in that case, as committed by the executor Woods was based upon the petition filed by him for the probate of the will of Zaremba, deceased, in which the statement appeared that the deceased left no heirs. That this statement was made for the purpose of preventing the heirs of the deceased learning of the passing of Adolph Erich Zaremba, and of the fact that he had made a will in favor of Woods. The will was admitted to probate. The plaintiff did not learn of the fact of there being a will, or of its probate until more than six months had elapsed. He acquired such knowledge upon coming to California for the purpose of visiting his brother and for the first time ascertained that his brother had died on January 31, 1933. The time having elapsed for the contest of the probate of the will, referred to, the plaintiff filed his complaint in equity, based upon the alleged extrinsic fraud of Woods in concealing the fact of the deceased having relatives, it being alleged in the complaint that the statement in the petition that the deceased died without leaving relatives, was known by Woods to be false, and was fraudulently made for the purpose of concealing the fact of the death of Adolph Erich Zaremba, and of the proceedings for the probate of the will. (Similar allegations are made by the plaintiffs in this case.) R. 8 par. 18, R. 9 and 10 Sub. Par. C, R. 19, 20, 21, 22 down to Par. 24.

The Court there said:

> "The omission of stating the fact of heirs in the petition filed by Dr. Woods necessarily pre-

vented the clerk of the court from giving the notices specified in Section 328, supra, to be given.

"That an action in equity will lie just as here instituted, we need cite only one case, to-wit, Caldwell v. Taylor, 218 Cal. 471, 23 P. (2d) 758, 88 A.L.R. 1194. This case quotes at length from the case of U. S. v. Throckmorton, 98 U.S. 61, 25 L. Ed. 93. The distinction between extrinsic and intrinsic fraud is there clearly defined. The 'extrinsic fraud' consists in the deception practiced by the successful party in keeping his opponent in ignorance of the proceeding. 'Intrinsic fraud' is mentioned as being perjured testimony given at the trial. This case also establishes the law that where extrinsic fraud is shown to exist, the successful party may be held a trustee for the benefit of those who are entitled to receive the property of the estate. While the judgment or decree of the probate court is not set aside, the distribution of the property may be ordered made to those legally entitled to receive the same."

Zaremba v. Woods, 61 P. (2d) 976.

2. The decree of distribution is void for the reason that it shows on its face that Moses Hopkins administrator, at the time of filing his application for appointment as administrator and the time he filed his petition for distribution, failed to furnish the Court with the names and addresses of his brothers and sisters heirs of Mark Hopkins, as required by sec. 1371 of the Code of Civil Procedure of California, then in effect:

"Petitions for letters of administration must be in writing signed by the applicant or his counsel,

and filed with the clerk of the Court, stating the essential facts to give the Court jurisdiction of the case, and when known to the applicant, *he must state the names, ages and residences of the heirs of the decedent, and the value and character of the property.* If the jurisdictional facts existed, but are not fully set forth in the petition, *and are afterwards proven in the course of administration,* the decree or order of administration and subsequent proceedings are not void on account of such want of jurisdictional averments." (Emphasis ours.)

The names, ages and residence of the said brothers and sisters, heirs of Mark Hopkins, were not reported to the Court in the Petition for Letters of Administration nor were they afterwards proven in the course of administration, as shown on the decree of distribution; which decree states that Moses Hopkins and Mary Frances Sherwood-Hopkins were the only persons interested in said estate. (Ex. "A", R. 49.)

The purported decree of distribution, Exhibit "A" R. 49, shows on its face that only two persons, viz.: Mary Frances Sherwood-Hopkins, and Moses Hopkins, the administrator, had any interest in the estate and said account was settled and allowed, R. 49 and R. 145, Exhibit "A", establishes conclusively that the names, ages and residences of James Hopkins, John Hopkins, Martin Hopkins, Joseph Hopkins, brothers of the deceased, and Annie Hopkins Russell, Prudence Hopkins Russell and Rebecca Hopkins Griffin, sisters of deceased, were not stated in the petition for letters of administration or proven in the course of ad-

ministration. The complaint, R. 10, 21, and 27, shows that both Mary Frances Sherwood-Hopkins and Moses Hopkins well knew the names of Mark Hopkins' brothers and sisters and their post office addresses.

DECREE VOID ON ITS FACE.

3. The decree of distribution is void upon its face by reason of the failure of the Court to find who were the heirs of Mark Hopkins, but in lieu thereof distributed the estate to parties "interested". The reference in the decree to Mary Frances Sherwood-Hopkins as the wife of Mark Hopkins and to Moses Hopkins as the brother of said deceased, is not a finding as to who were heirs, or all the heirs of Mark Hopkins, or to all of the persons interested in the estate. (Ex. "A" R. 49.)

4. The decree is void on its face in that it shows that the Probate Court exceeded its jurisdiction in distributing the real property of the estate based upon and pursuant to the terms of a contract entered into by Mary Frances and Samuel Hopkins, (persons not related to Mark Hopkins) and Moses Hopkins without a finding that the parties to the contract were the heirs, or all the heirs of Mark Hopkins or entitled to any portion of the estate. (Ex. "A" R. 50.)

In *Chever et al. v. Ching Hong Pay et al.*, 82 Cal. 68, 22 Pac. 1081, the Court said:

> "The Probate Court has jurisdiction to determine who are the legal heirs of a deceased person who

died intestate * * *, but its determination of such matters does not *create any new title.* It merely declares the title which accrued under *the laws of descents.* The decree of distribution has nothing to do with *contracts* or conveyances which may have been made by heirs, devisees, or legatees, of or about their shares of the estate, either among themselves or with others. *Such matters are not before the Probate Court, and over them it has no jurisdiction."* (Emphasis ours.)

Kingsbury v. Ross, 19 Pac. (2d) 784; 217 Cal. 484;

Archer v. Harvey, 164 Cal. 274; 128 Pac. 410;

Parr v. Reyman, 215 Cal. 616; 12 Pac. (2d) 440.

ASSIGNMENTS OF ERROR NOS. 3 AND 4.

The Court of Appeals erred in the statement that the plaintiffs claim the decree of distribution is void for three reasons only, and the Court overlooked seven of the material issues raised by the pleadings showing the invalidity of the decree which are set out fully in the assignments of error No. 4, and upon said finding the Court of Appeals held the decree valid and that it distributed the entire estate. This case has many material issues that must be taken into consideration. The Court cannot base its opinion upon three issues and decide this case on its merits. The facts are, that the Probate Court exceeded its jurisdiction in the appointment of Moses Hopkins as administrator (R. p. 80); it failed to determine heirship (Ex.

A, R. 49, par. 19, subsec. I, R. 17); it attempted to distribute the real property of the estate based upon a contract, and not by the laws of descent (par. 19, subsec. H, R. 15); that the administrator Moses Hopkins in filing for letters of administration concealed from the Court the names, ages and addresses of the heirs and did not prove them in the course of administration as appears on the face of the decree (Ex. A, R. 49), but instead, represented to the Court that he and Mary Frances were the only parties interested (Ex. A, R. 49). In concealing these facts from the Court, and concealing the property of the estate, except the cash on hand, and reporting property as constituting the residue of the estate that was not in existence at the time, constituted a fraud upon the heirs as well as the Court (par. 19, subsecs. F and G, R. 11-12). The administrator was guilty of a breach of trust, in failing to disclose to his brothers and sisters, heirs of Mark Hopkins, the nature, extent and character of said estate and to see that their interests were protected (par. 19, subsec. M, R. 18-19-20). All these issues were raised by the pleadings and are vital and material, and if true, would establish the invalidity of the decree of distribution and the deeds set out in the complaint. The decision of the Court without taking these issues into consideration deprived the plaintiffs of their legal and constitutional rights, and of a hearing on the merits of the action.

In *Lann v. Kipp,* 145 N.W. 183, the Court said:

> "Here the respondent, as before suggested, owed the appellants the act of duty, independent

of any litigation to make a full disclosure of his transactions as trustee, that duty he owed in a high degree, in the litigation, and also he owed the duty of making such disclosure to the court and to its referee. According to the complaint he not only failed in this respect preventing thereby appellants from having the benefit thereof in the litigation, but palmed off on all the parties spurious deceptive paper as a disclosure and thus secured the judgment complained of. If these facts can be established, they will make a case within the Throckmorton rule and the broader rule in Marine Insurance Co. v. Hodgson. Chief Justice Marshall there guarded the doctrine proclaimed by prefacing with those words without attempting to draw any precise line to which courts of equity advance and which they cannot pass in restraining parties from availing themselves of judgments at law, it may be safely said using the language before quoted. In this case the court said 'so the vital question to be determined in such cases as this, is not, merely, whether the judgment was secured by fraud, without inexcusable fault of the aggrieved party, but was it secured by fraud without such fault and are the circumstances so serious that the doors of equity ought to be opened to afford relief.' "

In *Aldrich v. Barton,* 138 Cal. 220 at 223, 71 Pac. 169, the Court said:

"In this case the plaintiff alleged that the trustee withheld funds and failed to report same to the court. That it was a fraud upon the court and the interested party. The court said the trustee took advantage of the absence of the cestui que

trust to present a false and fraudulent petition to the court and have it acted upon without her knowledge, this was a fraud upon the court as well as upon the absent interested party, and this is held to be extrinsic fraud, which prevented the plaintiff from being properly represented at the hearing or from being represented at all."

Sohler v. Sohler, 135 Cal. 323, 67 Pac. 282:

"Respondents, against the sufficiency of the complaint, urged by their demurrer that it is the exclusive province of the court in probate to determine heirship and decree distribution; that the complaint goes no further than to charge intrinsic fraud, in that Paul Reuss succeeded by false and perjured evidence in obtaining a favorable decision upon a matter essential to the proceeding, and one in which the court was bound to exercise its judgment; and that, notwithstanding that the decision was obtained by such evidence, this fact affords no ground for relief in equity. If this were all the complaint discloses, the respondent's contention would be undoubtedly sound; for it is the general rule that intrinsic fraud—fraud by which a decree or judgment is obtained by false evidence upon issues within the case—is not such fraud as equity will relieve against; the theory being that the losing litigant has had his day in court, and that, while it must always remain a misfortune that private causes shall be lost by forsworn testimony, yet stronger than this consideration is that which declares it to be the policy of the law to make an end of litigation, and in the nature of things, there never could be a final judgment if every judgment was open to avoidance upon the charge that fraudulent evidence

had been introduced in its procurement. Therefore it is the general rule that extrinsic fraud only will form the basis of such relief as is here sought—extrinsic fraud consisting in the failure to give legal notice to the adversary, the prevention of his or her witnesses from attending the trial, and the like. But when we come to scan the allegations of this complaint, it will be discovered that there is more alleged than the mere procurement of this decree by false evidence. The executrix of the estate was not alone the trustee of all of the heirs of the estate, and all of the parties in interest thereto and thereunder. She was the mother of these minor plaintiffs, had their actual custody and control, and, as their natural guardian, was chargeable with all the high duties pertaining to that relationship. As executrix, merely, it might be argued that she was a disinterested party, having no concern whatsoever in question of heirship or right of distribution, standing indifferent between the parties, and interested only in carrying into effect the determination of the court upon these questions. But as the mother and natural guardian of these plaintiffs her position was a very different one. She was under most solemn obligation to protect the legal rights of her infant and dependent offspring. She was under like obligation to disclose to the court on their behalf, and in their interest, all knowledge which she possessed, and she was under the same obligation to see that their legal claims to the estate were properly presented before the court in probate; and with peculiar force did this duty press upon her, in view of the fact that during all of this time she was executrix of and administered upon the estate through which

her children were to derive their property. Such being her position, it is charged that in violation of this duty, and of the rights of her minor children, she connived with her adult son, not an heir to the estate of the deceased, to procure for him a distributive portion of that estate, and that the conspiracy was carried to a successful termination. Here, certainly, is a charge of concealment upon the part of the guardian when she should have spoken in the interest of her wards, and collusion upon the part of the guardian with another not in interest in the estate, to the end that that other might despoil the wards of their rightful inheritance. It cannot to this be answered that the probate proceeding upon distribution was not an adversary proceeding. It becomes adversary in every case where there are conflicting claims, and where there be not the most perfect understanding and harmony between the claimants. The moment heirship was set up by the false claimant, Reuss, that moment between him and the rightful heirs an adversary proceeding was at issue, and from that moment it became the duty of the guardian of these minor heirs to see that the fullest presentation of their claims was put before the court. This, by conspiracy with her codefendant, it is asserted, she did not do; and it is clear that her fraud in pushing on behalf of Reuss his false claim to heirship and distribution, and in concealing the truth from her own minor children, the rightful heirs, and in leaving them in ignorance that they were thus to be deprived of their patrimony, was fraud extrinsic to the case, which prevented their being properly represented at the case, or from being represented at all.

We conclude, therefore, that the complaint presents a bill for equitable relief. But for what kind of relief? The relief prayed for is that the court in equity should avoid so much of the decree as distributes the property to Paul Reuss, should decree that the plaintiffs are entitled to that property in equal shares, and should distribute it accordingly. The prayer for such relief derives support from the case of Baker v. O'Riordan, 65 Cal. 368, 4 Pac. 232. In that case a married woman, the owner of separate property in San Francisco, died while her husband was at sea. Her sister procured letters of administration upon the estate, and sought and obtained distribution upon a petition that her sister had conveyed the property to her in her lifetime by an unrecorded deed which was lost. The appearance of the absent husband was falsely entered by an authorized attorney. The trial court found all these facts, but withheld relief; and this court declared that the plaintiff was entitled to the relief sought,—the setting aside of the decree of distribution."

ASSIGNMENT OF ERROR NO. 5.

The Court erred in its statement that the plaintiffs recognized Moses Hopkins as administrator. The pleadings do not bear out this statement. While the plaintiffs allege that Moses Hopkins was appointed administrator, the pleadings go farther and question the legality of said appointment (R. 81), and if the allegations are true, under the law, there was no administrator.

ASSIGNMENT OF ERRORS NOS. 6 AND 11.

The Court of Appeals erred in holding that the decree of distribution distributed the entire estate based upon the omnibus clause.

In the case at bar, the omnibus clause of the decree does not distribute known property but only any other property not now known or discovered which may belong to said estate or in which the said estate may have any interest. No language is used from which it can be inferred that the Court did or intended to distribute the millions of dollars worth of property described in the complaint known by the administrator to belong to the estate and concealed from the Court in his final account and not specifically described in the decree.

Clearly the words of said omnibus clause "or in which said estate may have any interest" relate back to the last antecedent which is "and any other property not now known or discovered;" and the correct construction of said omnibus clause is any other property not now known or discovered in which the said estate may have any interest be and the same is hereby distributed.

The word "or" in the omnibus clause was used to express an alternative of terms, or explanation of the same things in different words, and was used to explain the meaning of the preceding clause, and the same unknown property was meant by both expressions.

In *Downs v. Allen,* 22 Fed. 805 at 809, the Court said.

"Remembering that the judgment against the five named persons is, in legal effect, a judgment against the survivors, the words, 'or such of them as are now surviving', cannot be considered to have been used in the alternative, in the sense of offering a choice or making a distinction between two sets of defendants. 'Or' is often used to express an alternative of terms, definitions or explanations of the same thing in different words. It was used in this case to explain the meaning of the preceding clause and the same persons were meant by both expressions."

In *Campbell v. Chicago B. & Q. R. Co.*, 245 S.W. 58-61, the Court said:

"Webster defines the word 'or' as being properly used as joining alternative terms expressing unlike things or ideas, or different terms expressing the same thing or idea as this is a sphere or globe * * * we hold as was held in Garvey v. Marks, 134 Mo. 1-9 that the two propositions coupled by the disjunctive conjunction are in effect the same stated in different words."

In 29 *Cyc.* 1503, subdivision 4, it is said:

"The alternative need not be of fact, and the word 'or' is often used to express an alternative of terms, definitions or explanations of the same thing in different words, introducing a synonym for or an explanation of the preceding term. (Citing Arthur v. Cumming, 91 U.S. 362, 364; 23 L. Ed. 438.) In which case it has been held equivalent to 'to-wit' (citing many cases under Note 14) or such other like expressions as 'that is to say,' 'otherwise called,' 'being.'" (Citing cases.)

First, we distinguish the cases cited by the honorable Court of Appeals, from the instant case. In the cases cited the facts and parties were before the Court, the only question involved was, that the administrator in filing his report had omitted a small portion of the property, *there were no allegatians as to concealment of heirship, or that the Court had exceeded its jurisdiction, or concealment of property, or fraud on the part of the administrator.*

In *Luckey v. Loney,* 80 Cal. App. 20-24, cited by the Court, the Court said:

> "While in proper cases, equity will relieve against extrinsic fraud, * * *" at page 25, "But in the instant case there is no finding of the court that plaintiff or his predecessors in title were guilty of extrinsic fraud or any fraud at all."

In the case before the Court the allegations in the complaint show that the administration was tainted with every species of fraud known to probate procedure from its inception to and including the purported decree of distribution. The allegations of the complaint show that Mary Frances Sherwood, not the wife of Mark Hopkins, was represented as being his wife and entitled to share in the estate; that the heirs of the deceased were concealed from the Court, that all the property in existence, except the cash on hand, was concealed from the heirs and from the Court. That information was given by the administrator to those entitled to share with him, that the deceased had left a will and a wife and nine children, instead of advising the heirs, his own brothers and

sisters, of the true status and the facts existing during the probate proceeding, and protecting their interest as the law requires, selling property without an order or confirmation of the Probate Court, and applying the proceeds to his own use. These allegations of the complaint takes this case out of the rule applied by the honorable Court of Appeals.

Speaking of negligence, limitations, laches and stale claims, the Court should be slow, if at all, in applying the rules of negligence, limitations, laches and stale claims, in the face of the fraud alleged in this case.

In *Bergin v. Haight,* 99 Cal. 52, the Court said:

> An administrator holds property in trust for the heirs, it was his duty as administrator to give the parties interested notice, it is fraud for an administrator to purchase property of the estate, the property of a decedent upon his death vest in his heirs, an administration is primarily for the purpose of paying debts of the deceased, and distributing the property among those entitled to it.
>
> *Lataillade v. Orena,* 91 Cal. 565, 27 Pac. 924;
> 25 *Amer. State Reports* 219;
> *Griffith v. Godey,* 113 U.S. 89, 28 L. Ed. 934.

In the *Orena* case, the defendant as guardian of the plaintiff, filed in court an inventory purporting to show all the estate of the ward, but did not include in the inventory any of the property mentioned in plaintiff's complaint, and when he applied for and obtained a final discharge from his trust he falsely stated in his petition and represented to the Court

that he had returned a full and true inventory of all the estate of the plaintiff which had come into his hands as guardian, and had paid over and delivered the same to plaintiff.

ASSIGNMENT OF ERROR NO. 7.

The Court erred in holding that appellants are barred by section 338 California Code of Civil Procedure. The Court overlooked the fact, that limitations do not run against void instruments, or where the Court exceeds its jurisdiction. Under the allegations of void judgments and void instruments in the complaint, section 338 has no application.

See authorities cited under points of error 8 and 9.

ASSIGNMENTS OF ERROR NOS. 8 AND 9.

The Court of Appeals erred in holding that appellants had actual notice of the alleged fraud and are barred by limitations and laches. The complaint in this action alleges that neither the plaintiffs nor their ancestors discovered the fraud set out in the complaint (R. pp. 21 to 26, par. 21 through 30), until 1945, and there was no evidence on the motion to dismiss that they ever knew of or had reason to believe that the property set forth in the complaint had been fraudulently concealed by the administrator or that such property ever existed until 1945. The

only evidence on the motion to dismiss and upon which the Court of Appeals based its findings that the plaintiffs or their ancestors knew of the fraud was the affidavit of Estelle Cochran Latta, one of the appellants, in which she stated that her father learned in 1925 that Mark Hopkins was never married, and the affidavit by Jones Griffin the statement that about the year 1925 affiant and other heirs of Mark Hopkins in North Carolina first learned that Mark Hopkins had died intestate and left no wife and children and left an estate. The fact they discovered that Mark Hopkins had died without leaving a wife and children does not show they knew of or had reasons to believe prior to 1945, that a fraud had been committed by Moses Hopkins, by which he concealed the millions of dollars alleged in the complaint, or that they knew prior to 1945, that the property described in the complaint existed; but said affidavits do say that the heirs of Mark Hopkins, nor the plaintiffs herein did not discover and had no knowledge of the existence of the facts alleged in the complaint until 1945, and that their predecessors never knew of the existence of said property.

While it is true some of the heirs heard that Mark Hopkins had died and left an estate and was not married, the facts to substantiate this information were not discovered until 1945. The plaintiffs lived three thousand miles from California, the records were destroyed in the county where the proceeding was had, and were only discovered after research in other counties.

However that may be, in this case the vital question to be determined is not merely whether the judgment was secured by fraud, without inexcusable fault of the plaintiffs who are the aggrieved parties, but was it secured by fraud without such fault, and are the circumstances so serious that the courts should investigate the facts and render judgment accordingly. Thus, if the allegations in the complaint alleging that the order appointing Moses Hopkins was void, that the deeds set out therein are void, or that the decree of distribution is void for any reason alleged in the complaint, then the defense of notice, limitations and laches do not apply, and the Court erred in so holding.

In *Wills v. Nehalem Coal Co.,* 96 Pac. 528 at 535, the Court said:

> The rule, if such is the rule, (constructive notice) that when the means of knowledge are open to the stockholder, he is chargeable with knowledge from the date when he should have ascertained the facts, cannot be applied here for two reasons: First, because the means of knowledge is rebutted by the averment that the officers and directors have refused to permit the stockholders to examine the books of the Corporation; and, second, *because constructive notice or knowledge does not apply to a case of fraud* and cannot relieve a party responsible for fraud. Citing, Converse vs. Blumrich, 14 Michigan 109.

No claim becomes stale and barred where there is a right and a wrong involved, which resulted in the enrichment of the wrongdoer and the impoverishment

of the ones to whom a solemn duty is owing, where there is a premeditated fraud of the most serious nature, by an administrator while acting in a fiduciary capacity and a position of trust for the purpose of the preservation and proper administration and distribution of the estate, intrusted to him by law. Time is not the essence in such cases.

In *Thayer v. Village of Downers Grove,* 16 N.E. (2d) 715-719, the Court said:

"Laches does not apply to void judgments."

In *Nichols v. Superior Court,* 28 Pac. (2d) 714 (Cal. App.), the Court said:

"Even as to laches, the rule as expressed in 15 Cal. Jurisprudence 57, is that it has no application to an attack upon a judgment void for lack of jurisdiction. And in 15 Ruling Case Law, P. 694, may be found the declaration that 'if the judgment is void on its face, it is usually held that no limitations can with propriety be interposed, for the reason that no amount of acquiescence can make such a judgment valid.'"

In *Black on Judgments,* section 355, it is said:

"If a judgment is absolutely void, and a mere nullity of course it is no protection or justification to any person, and it is immaterial whether it be set aside or not."

Restatement of the Law, section 219, pages 629-630:

"Although the beneficiary may be barred by laches from holding the trustee liable for breach of trust, he does not lose his interest in the trust

property, merely because of lapse of time however great."

Also section 409, page 1255—

"The beneficiary of a resulting trust is not barred merely by lapse of time from enforcing the trust".

Miller v. Ash, 156 Cal. 544-547;

Lann v. Kipp, 145 N.W. 183.

In *Prevost v. Gratz,* Wheaton's Reports, U.S.A., Vol. 6 now 19, p. 481 at pp. 497-8, the Court said:

"It is certainly true, that length of time is no bar to a trust clearly established; and in cases where fraud is imputed and proved, length of time ought not, upon principles of eternal justice to be admitted to repel relief, on the contrary, it would seem that the length of time, during which the fraud has been successfully concealed and practiced, is rather an aggravation of the offense, and calls more loudly upon a court of equity to grant ample and decisive relief."

LACHES UNDER ANY CIRCUMSTANCES DOES NOT APPLY TO THE FACTS IN THE COMPLAINT.

Restatement of the Law of Restitution, chapter 8, section 148, page 589, subsection 1, treats the subject of laches fully and is in accord with the authorities herein cited.

Briggs v. Buzzall, 204 N.W. 548 at 549, 164 Minn. 116, says:

"Inactivity when it is not blamable, is not laches. No one can be charged with negligence in the assertion of his rights as will bar one from obtaining equitable relief. The pith of the doctrine of laches is unreasonable delay in enforcing a known right."

Kessler & Co. v. Risley Co., 129 Fed. 397 at 418:

"Inactivity when it is not blamable is not laches. No one can be charged with negligence in the assertion of his rights unless he knows them. There is no such thing as acquiescence in a wrong, unless there is notice or knowledge of the wrong."

Standard Oil of Colorado v. Standard Oil Co., 72 Fed. (2d) 524 at 527:

"Laches cannot be imputed to one who has been justifiably ignorant of the facts creating his cause of action."

McGuire v. Savings and Loan Asso., 23 Cal. (2d) 719, 146 Pac. (2d) 673:

"Laches does not result from mere passage of time. * * *"

Page 736—

"The fact determination of the controversy involves an investigation of rights originating many years past does not render that claim stale."

Volume 10, *California Jurisprudence,* section 66, says:

"One of the principal factors in determining laches is acquiescence. But acquiescence, to be significant must be based on knowledge; that is

to say—a full knowledge of the facts. Acquiescence to constitute laches, must be with knowledge of the wrongful acts themselves and of their injurious consequences, it must be voluntary, not the result of accident, nor of causes rendering it a physical, legal, or moral necessity."

Broderick's Will, 83 U.S. 503:

"If fraud is kept concealed so as not to come to the party injured he will not be charged with laches."

Hovey v. Bradbury, 112 Cal. 620, 44 Pac. 1077:

"Though the conduct of a trustee amounted to a repudiation of the trust, such repudiation cannot set in motion the statute of limitations, nor raise the bar of laches, unless it was unequivocally brought to the knowledge of the beneficiary."

Estate of Ron, 185 Cal. 8, see pages 18 and 19:

"The equitable doctrine of laches has no application to a contest of distribution as to heirship, since the claimants in such proceeding occupy no relation one to the other as may fairly be held to impress upon one in favor of another any obligation of diligence in the matter of presenting his claim."

Effect of laches and terminating the trust.

Restatement of Law, section 219, pages 629, 630:

"Although the beneficiary may be barred by laches from holding the trustee liable for breach of trust, he does not lose his interest in the trust property merely because of lapse of time, however great."

Investigation Prevented or Difficult.

Volume 12, *California Jurisprudence,* page 762, section 36:

> "A party may be excused from investigation where he is prevented, by false and fraudulent representations as to material facts, from seeking the information which he does not possess, and which, but for such misrepresentations, he might obtain. And although an examination is made, relief will still be afforded if means are used to prevent a complete investigation. Where, for example, one is induced to sign an instrument by false statements as to its contents, made with intent to mislead and to prevent him from making an examination of its provisions, it is no answer to say that a higher degree of care would have enabled him to escape its effect. And where, by artifice, a vendor prevents the purchaser's investigation from being as full as he desires to make it, relief may be awarded. Similarly, a seller of chattels is not at liberty to hinder or obstruct the purchaser in his attempts to find out defects or blemishes, although he may be under no obligation to point them out. A grantee is not permitted, however, to plead ignorance of the covenants of a deed delivered to him, after it has been accepted and recorded, as a ground for defeating the force and effect of such covenants, where there is no evidence that the grantor in any way prevented a personal inspection of the contents of the deed."
>
> "Investigation may be excused also where distance from the object of the transaction, or some similar cause, renders examination extremely dif-

ficult. This rule, however, is not applied indiscriminately, and the fact that property is at a distance does not always excuse an investigation."

Circumstances Excusing Investigation.

Volume 12, *California Jurisprudence,* section 34, page 758:

" 'Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual agreement; and he is under no obligation to investigate and verify statements to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith.' The party making the representation cannot escape responsibility by showing that the other party might have ascertained that such representation was untrue, or had no right to believe it. Where one is justified in relying, and in fact does rely, upon false representations, his right of action is not destroyed because means of knowledge were open to him. In such a case, no duty rests upon him to employ such means of knowledge, even though by reason thereof, in the absence of any representation at all, a constructive notice would be inferred. The doctrine of constructive notice does not apply where there has been such a representation of fact. If the representation is of a character to induce action and does induce it, that is enough. It matters not that a person misled may be, in some loose sense, negligent, for it is said not to be just that a man who deceives another should be permitted to say to him, 'You ought not to believe or trust me,' or 'You are yourself guilty of negligence'."

ASSIGNMENT OF ERROR NO. 10.

The Court erred in holding that the plaintiffs are subject to section 1666, Code of Civil Procedure of California.

This section clearly has no application to the facts alleged in the instant case. The statute says: "In the orders and decrees, the court *must* name the persons and the proportions or parts to which each shall be entitled." (This was not done in this case, the law-making body did not mean that one heir could go out in the highways and hedges and bring in persons who were not related to the deceased, make a written agreement with them for the distribution of an estate in which they were not heirs or devisees, and call them interested parties.) The statute goes on to say: "and such persons (referring to those named) may demand, sue for and recover their respective *shares* from the executor or administrator." (Emphasis ours.)

This section only applies to the persons named as distributees in the decree, and not to those who had no knowledge of the administration or the signing of the decree. Again we come back to the fact that where there is extrinsic fraud equity will intervene.

> *Security First Nat. Bank of Los Angeles v. Easter,* 29 Pac. (2d) 422-423:
>
> "Section 1021 of the Probate Code, which provides that such order or decree, when it becomes final, is conclusive as to the rights of heirs, devisees and legatees, does not divest a court of equity of its jurisdiction to afford a remedy for an erroneous distribution of property or to construe a declaration of trust when it appears the

decree of distribution was procured by fraud, or mistake, or when it is sought to modify the decree by consent of all interested parties."

Estate of Walker, 160 Cal. 547, 117 Pac. 510;

Fletcher v. Los Angeles Trust and Savings Bank, 182 C. 177, 187 P. 425;

Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317-321;

Whittingham v. California Trust Co., 214 Cal. 128, 4 P. (2d) 142.

In *Bacon v. Bacon* the Court said:

"We conclude that the provisions of Sec. 1666, C. C. P. now Sec. 1021, of the Probate Code, do not prevent a review of a decree of distribution by a suit in equity, in a proper case."

ASSIGNMENT OF ERROR NO. 12.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE DECREE OF DISTRIBUTION WAS NOT A DECREE OF PARTIAL DISTRIBUTION.

It is shown on the face of the decree, R. 49 Ex. A, that the administrator had cash on hand in the sum of $895,891.01, and is shown, R. p. 51, that only $895,078.01 was distributed, leaving the sum of $816.00 undistributed and unaccounted for (R. 11 to 15, par. 19, subsecs. F and G). The complaint alleges that there were $24,940,597.29 of personal property unaccounted for and undistributed. The decree was made on the petition of the administrator and was a partial distribution, and void.

Section 1658 of *Code of Civil Procedure of California* in effect in 1883, provided:

"At any time after the lapse of four months from the issuing of letters testamentary or of administration, any heir, devisee or legatee may present his petition to the Court for the legacy or share of the estate to which he is entitled to be given him upon his giving bond, with security for the payment of his proportion of the debts of the estate."

In re Letellier's Estate, 74 Cal. 311, 15 Pac. 847.

In *Alcorn et al. v. Buschke,* 133 Cal. 655-658, 66 Pac. 15:

"As to the validity of the decree of distribution no argument is advanced by the respondent's counsel, or rather argument is expressly declined. But clearly the proceeding, which was on the petition of the administrator for partial distribution, was without jurisdiction, and the judgment void."

In *Alcorn v. Gieseke,* 158 Cal. 396, 111 Pac. 98-101, the Court said:

"It may be equally conceded that the decree of partial distribution was void because the court had no jurisdiction to entertain it by the petition of administrator, the statute only authorizing it on the part of the heirs, devisees or legatees."

Pickens v. Merrim et al., 242 Fed. 369;

Freeman on Judgments, Vol. 3, Sec. 1234, p. 2572;

21 *Cal. Jur.,* p. 58, Sec. 34.

ASSIGNMENT OF ERROR NO. 13.

The Court of Appeals erred in holding that the deeds (Ex. B, C and D, R. 53-55 and 61) passed title to the interest of the heirs who were not parties to said attempted conveyance. While it is true that an heir can convey his interest in property, as stated by the Court, he cannot convey the interest of his tenants in common. The deeds (Ex. C and D, R. 55 and 61) were executed by Mary Frances, Moses and Samuel, during the administration of Mary Frances Sherwood-Hopkins, and prior to the decree of distribution purporting to convey all their interest in the property of Mark Hopkins therein described, are void on their face, in so far as the vested interests of the seven brothers and sisters are concerned, in that there does not appear on the face of said deeds that an order of the Probate Court for such sale, or confirmation of the same, was ever made, nor is there any reference to where such order could be found in the records as prescribed by section 1517 Code of Civil Procedure, now section 755 of Probate Code. These defects appearing upon the face of the deeds were notice to subsequent purchasers. The deeds, in any event, could not transfer the interest in said property of the brothers and sisters of Mark Hopkins. Said deeds being void upon their face, laches and the statute of limitations do not apply.

The pleadings set forth clearly the issues of the validity of said deeds and the issue of extrinsic fraud perpetrated upon the plaintiffs and their ancestors and the Court of Appeals erred in ignoring these

material issues and by its judgment dismissing the action on the grounds of laches and statute of limitations.

The holding by the Court of Appeals that the appellants were charged with constructive notice from the date of recordation of said deeds, is an evasion of the issue of the legality and validity of said deeds. If the deeds were void then the statute of limitations and laches do not apply. In ignoring these issues, the judgment of dismissal of the complaint, in legal effect is the depriving the plaintiffs of their property without due process of law. The deed from Moses and Samuel Hopkins to Mary Frances Sherwood-Hopkins (Ex. B, R. 53), attempting to grant, bargain, sell and convey a one eighth interest each in all the real estate owned by Mark Hopkins, deceased, to the said Mary Frances Sherwood-Hopkins, without an order or confirmation of the Probate Court, while she was acting as administratrix and in a fiduciary capacity, is void except as to any interest they might have.

It may be noted, however, that the language of this deed in which Moses Hopkins conveyed all of his right, title and interest in and to all of the real property in the State of California of which Mark Hopkins died seized and possessed, being a one-eighth interest, shows that Moses Hopkins recognized that seven-eighths of said property vested in other heirs. (R. pp. 54, 55, Exhibit "B".)

WHERE ARE THE SEVEN?

The decree states that Mary Frances Sherwood-Hopkins and the administrator Moses Hopkins were the only parties interested. These facts are an open window through which the Court can see the concealment and fraud in this case.

The deed (Ex. B, R. 53) is void on its face for the further reason that there is a lack of description of the property therein attempted to be conveyed. The description:

> "Do by these presence grant bargin sell convey unto said party of the second part and to her heirs and assigns forever all of their right title and interest in and to all of the real estate of which the said Mark Hopkins died seized and possessed situated lying and being within the State of California."

In *Nease v. Coal and Coke Railroad,* 195 Fed. 987, the Court said:

> "This conclusion it seems to me to be inevitable upon the well settled principle: That purchasers with full notice of another's rights cannot secure any greater interest as against such other's rights than that vested in the vendor, and when their vendor's rights are incumbered with certain and fixed obligations to be performed in the future, they take cum onere."

At page 997:

> "Where vested interest in real estate are secured by executory contracts acknowledged and recorded, under ordinary conditions, the defense of

laches in asserting and maturing such interest into perfect legal title is not applicable. * * * But where one holds in *privity of title* with another, he will not be permitted to plead the neglect or laches of the other in asserting and taking possession of his interest, in such cases he will be held a trustee for the other."

Rannela v. Rowe, 145 Fed. 296:

"A warranty deed to lands belonging to the estate of a deceased made by his executor without authority, is ineffectual as against survivors, but where such executor was also a devisee of an interest in the land the deed being in excess of their power as executor passed title to their individual interest by estoppel."

"A trustee acting within his powers does not render himself liable on his contracts and conveyances; but whenever he exceeds his powers and undertakes to transfer and convey without authority he becomes personally answerable to the grantee on his covenants."

Citing:

Morris v. Watson, 15 Minn. 212;
Tarver v. Haines, 55 Ala. 503;
Allen v. DeWitt, 3 N.Y. 276-289;
Brown v. Edson, 23 Vt. 435.

"In the absence of some power contained in the will, or of authority derived from statute or order of court, neither an executor or administrator has any power whatever to sell the real estate of his deceased; an unauthorized conveyance may be

enjoined at the suit of an heir; a deed made by representative without authority is void except to pass his own interest."

136 Cal. 416, 69 P. 87, 145 Fed. 296.

Cal. Jur., Vol. 11, Sec. 494, page 832:

"Under the present system, no order directing a sale is required but, as under the former provisions, no title passes until the sale is confirmed by the Court. If an executor or administrator without authority makes a deed, individually and as executor, his deed has the effect to transfer his interest as heir in the property, but the deed cannot operate to divest the rights of the other heirs."

The above deeds were executed in their individual capacity as shown on the face of the deeds, and only pass whatever title they had if any were recorded, and were notice to subsequent purchasers.

THAT THE DECREE AND DEEDS FAIL TO DESCRIBE THE REAL ESTATE ATTEMPTED TO BE DISTRIBUTED, AND RECOGNIZED AND BASED ITS DISTRIBUTION UPON AN AGREEMENT BETWEEN MARY FRANCES, MOSES AND SAMUEL, AS SHOWN ON THE FACE OF THE DECREE.

(Paragraph 19, Subsec. H of the Complaint.)

Bates v. Howard, 105 Cal. 173.

"A decree may be void on account of the uncertainty of its description."

Saterstrom v. Click Bros., 5 Pac. (2d) 21, 118 Cal. App. 379.

"Deed must contain such description as will enable property to be readily located by reference thereto. * * * That if the writing itself does not furnish the means whereby the description may be made sufficiently definite and certain readily to locate the property, the instrument is void."

Smith v. Cal. Portland Credit Co., 25 Pac. (2d) 1013, 134 Cal. App. 630.

"Deed failing to describe land so that it might be located, and furnishes no means by which description could be made more definite held void."

Sepulveda v. Apablasa, 77 Pac. (2d) 526, 25 Cal. App. (2d) 381.

"A deed was void for uncertainty, where it contained no definite or ascertainable description of the property intended to be conveyed."

While the above citations apply to deeds the same principle applies to judgments or decrees where they attempt to convey title to real estate.

In *Scott v. Woodworth*, 167 Pac. 543, at page 546; 34 Cal. App. 400, at 409, the Court said:

"To be valid on its face, a deed must contain such a description of the real property thereby intended to be conveyed as will enable the property to be readily located by reference to the description. It is true that the description by boundaries may be ambiguous or indefinite, and still the deed sufficient if it otherwise provides means whereby the description can be made cer-

tain and the land identified and located. Where, however, the description is so vague or uncertain that the property cannot be identified and located therefrom, and the writing itself does not furnish the means whereby the description may be made sufficiently definite and certain readily to locate the property, the instrument must be held void, since the imperfections of the description cannot be supplied through evidence extrinsic to the writing itself without running up against the positive mandate of the rule that a conveyance of real property must be in writing."

Fletcher v. Superior Court, 79 Cal. App. 468 at 477.

"The agreement or consent of the parties cannot give the Court the right to adjudicate upon any cause of action or subject matter which the law withholds from its cognizance, and in such cases the order or judgment of the Court is void notwithstanding such consent. Consent may be given of the person but not of the subject matter."

In the instant case the decree shows on its face that the Court based its distribution of the real estate on the consent of the parties.

See Decree, Ex. A, at page 49 of R.

The complaint alleges that Mark Hopkins at the time of his death owned a one-fourth interest in the Southern Pacific Company, and the Central Pacific Railroad Company, as set out in plaintiffs' fourth and fifth causes of action of the Complaint. (R. p. 40, R. p. 43.)

It is further alleged in paragraph 59, R. 42, and paragraph 66, R. 44, that the descendants of the brothers and sisters of Mark Hopkins, own seven-eighths of the one-fourth interest.

It is alleged in paragraph 59, R. 42, and paragraph 69, R. 45, as follows:

> "Plaintiffs further allege that if said defendant corporation has transferred upon its books any of said stocks and bonds or entered thereon any assignment of the interest of plaintiffs in and to said stocks and bonds, or liquidated any stocks and bonds, such transfer, assignment, or liquidation of said stocks and bonds, or other interest of plaintiffs, was without authority of said heirs or of a court of law and in violation of the legal rights of said plaintiffs and their ancestors."

Section 1517, Code of Civil Procedure of California, Chapter VII, in 1879 was as follows:

> "No sale of any property of an estate of a decedent is valid unless made under order of the Probate Court, except as otherwise provided in this Chapter. All sales must be under oath reported to and confirmed by the court before the title to the property passes."

In 1880 this section was amended (1) in the first sentence substituting the word "Superior" for "Probate"; (2) in second sentence (a) changing "reported under oath" to "under oath reported to" and (b) omitting "Probate" before "Court".

C. C. P. section 1536:

"When a sale of property of the estate is necessary to pay the allowance of the family, or the debts outstanding against the decedent, or the debts, expenses, or charges of administration, or legacies, the executor or administrator may also sell any real, as well as personal property of the estate for that purpose, upon the order of the probate court; and an application for the sale of real property may also embrace the sale of personal property."

C. C. P. sec. 1524 (former section) read:

"Partnership interests or interests belonging to any estate by virtue of any partnership formerly existing, interest in personal property pledged, and choses in action, may be sold in the same manner as other personal property, when it appears to be for the best interest of the estate. Before confirming the sale of any partnership interest, whether made to the surviving partner or to any other person, the court or judge must carefully inquire into the condition of the partnership affairs, and must examine the surviving partner, if in the county and able to be present in court."

C. C. P. sec. 1525. Enacted March 11, 1872, and then read:

"If it appears that a sale is necessary for the payment of debts or the family allowance, or for the best interests of the estate and the persons interested in the property to be sold, whether it is or is not necessary to pay the debts or family allowance, the court or judge must order it to be made. In making orders and sales for the pay-

ment of debts or family allowance, the court or judge must so direct; and such articles as are not necessary for the support and subsistence of the family of the decedent, or are not specially bequeathed, must be first sold. Articles bequeathed must not be sold to pay debts or family allowance until all other personal estate has been applied to the payment thereof."

The sections above set out were in effect during and at the times all the Deeds "Ex. B, C and D" were executed and recorded and the personal property sold and included in "Ex. C" Sales of Personal Property. Sections 1522, 1523 and 1524 at that time also required confirmation by the Court.

The complaint alleges, R. 33, par. 43; R. 36, par. 49, and R. 37, par. 50, that said deeds were made without any order or confirmation of the Court, and the receipts therefrom were not accounted for in the purported decree of distribution.

The Deed "Ex. B", R. 53, was executed by Moses Hopkins and Samuel Hopkins to Mary Frances Sherwood-Hopkins while she was acting as administratrix of the estate of Mark Hopkins, deceased. Samuel Hopkins was not an heir and had no interest in the property of the estate of Mark Hopkins.

Deed "Ex. C", R. 55, was executed by Moses Hopkins, Mary Frances Sherwood-Hopkins and Samuel Hopkins to Collis P. Huntington, et al., while Mary Frances Sherwood-Hopkins was acting as administratrix, but signed individually by her, and not as administratrix.

Deed "Ex. D", R. 61, was executed by Mary Frances Sherwood-Hopkins, Samuel F. Hopkins and Moses Hopkins et al. to Ione Coal and Iron Co., during the time Mary Frances Sherwood-Hopkins was acting as administratrix, and signed individually by her, and not as administratrix.

Section 1576 of the Code of Civil Procedure, in effect at the time of the execution of the deed to Mary Frances Sherwood-Hopkins "Ex. B" of a ¼ of all real property belonging to the estate of Mark Hopkins was as follows:

> Enacted March 11, 1872; based on Probate Act 1851, Sec. 193, which read: "No executor or administrator shall directly or indirectly purchase any property of the estate he represented."

Section 1517 of the Code of Civil Procedure above quoted having provided that no sale of any property of an estate of a deceased person shall be valid, unless made under order of the Probate Court (or later Superior Court) the deeds set out in exhibits "B", "C" and "D" were invalid and void.

> "Sale or Deed Without Authority—Formerly, in California, no sale of any property of the estate of a decedent was valid unless made under order of the probate court, except as otherwise provided, such as in the case of sales under a power conferred by will, and no title passed until the sale was confirmed by the court. Authority for the sale or transfer of property of the estate was required to be found in the records of the court, and a sale without authority was wholly void. So also no conveyance could be made without an

order of court confirming the sale and directing such conveyance. Where the administrator took no proceedings and obtained no order to convey the property, his deed was without authority and void. A representative who sold or disposed of personal property belonging to the estate, which he believed worthless, without authority, was guilty of conversion and liable to the estate for its value with legal interest.

Under the present system, no order directing a sale is required, but, as under the former provisions, no title passes until the sale is confirmed by the court. If an executor or administrator without authority makes a deed, individually and as executor, his deed has the effect to transfer his interest as heir in the property, but the deed cannot operate to divest the rights of the other heirs. Although a conveyance under authority of special legislative act may be unavailing to transfer any title to the lands so conveyed, the deed may nevertheless be sufficient to give color of title in support of an entry on the property."

11 *Cal. Jur.*, p. 832, sec. 494.

In *Wells Fargo & Co. v. McCarthy*, 5 Cal. App. 301, 90 Pac. 203, the Court said:

"In this connection it is contended that the allegation of the execution of the assignment by the executrix is not sufficient because such execution by the executrix in the absence of an order of confirmation conveys no title. This doctrine is clearly established and must follow from the provisions of said section 1517, Code of Civil Procedure, and it has been so declared by the Supreme Court in Horton v. Jack, 115 Cal. 29, 46 Pac. 920: 'No sale of any property of the

estate of a deceased person passes any title unless it is confirmed by the probate court. Whether or not, then, this sale was in fact made to satisfy a debt of the estate, it is clear that neither the sale nor the supposed payment was sanctioned by the probate court, and that, therefore, the title to the property remained in the estate.' See also, Wickersham v. Johnston, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118; Bovard v. Dickenson, 131 Cal. 162, 63 Pac. 162."

11B *Cal. Juris.*, Secs. 684-685-686;

Huse v. Den, 54 Cal. 21;

Huse v. Den, 85 Cal. 390, 24 Pacific 790.

Section 1554 of the Code of Civil Procedure, in effect at the dates of said deeds, read as follows:

"If it appears to the court that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, or if disproportionate that a greater sum, as above specified cannot be obtained, or if the advance bid mentioned in Sec. 169 of this Act, be made and accepted by the court, the court shall make an order confirming the sale and directing conveyances to be executed, and such sale, from that time, shall be confirmed and valid, and a certified copy of the order authorizing the sale, and of the order confirming the same and directing conveyances to be executed, shall be recorded in the office of the recorder of the county within which the land sold is situated."

Section 1555, Code of Civil Procedure, in effect at the time said deeds were executed and recorded, read as follows:

"Conveyances must thereupon be executed to the purchaser by the executor or administrator, and they must refer to the orders of the probate court authorizing and confirming the sale of the property of the estate, and directing conveyances thereof to be executed, and to the record of the order of confirmation in the office of the county recorder, either by the date of such recording, or by the date, volume, and page of the record, and such reference shall have the same effect as if the orders were at large inserted in the conveyance. Conveyances so made convey all the right, title, interest, and estate of the decedent, in the premises, at the time of his death; if prior to the sale, by operation of law or otherwise, the estate has acquired any right, title, or interest in the premises, other than or in addition to that of the decedent at the time of his death, such right, title, or interest also passes by such conveyances."

The grantees in said Deeds "Ex. B, C and D", R. 53, 55, 61, and their grantees and successors had notice of the invalidity of said deeds by reason of the failure of said deeds to contain the provisions required by the statute, viz.: The failure of said deeds to refer to the orders of the Court confirming the sale of the property of the estate, and directing conveyances thereof to be executed, and to the record of the order of confirmation in the office of the county recorder, either by the date of such recording, or by the date, volume and page of the record. Civil Code section 19, in effect at the time said deeds were executed and recorded, read as follows:

"Every person who has actual notice of circumstance sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself. In all cases in which, by prosecuting such inquiry, he might have learned such facts."

Means of knowledge, especially where it consists of public records, is deemed in law to be knowledge. (*Wheaton v. Nolan,* 3 Cal. App. (2d) 401, 39 P. (2d) 457; *Bowman v. Bowman,* 125 Cal. App. 602, 13 P. (2d) 1049.)

The confirmation intended is such a one as is made after a return has been filed, and the parties in interest have had an opportunity to file objections and to be heard thereon. The allowance and approval of the account of the representative, charging him with money received upon the sale, do not amount to a confirmation of the sale; nor does an order in the decree of distribution to the effect that all acts and proceedings, as reported to the Court and as appear upon the record, shall be approved and confirmed, amount to a confirmation within the meaning of the code.

11B *Cal. Jur.,* p. 147, Sec. 752;
Estate of Delaney, 49 Cal. 76 (decided under the old law in force 1878).

A sale which is void cannot be confirmed. Such a sale cannot be made valid and binding by any number of so-called confirmations.

Miller v. Sup. Court, 82 Cal. App. 643, 258 P. 614.

Under former law see *Estate of Devincenzi,* 131 Cal. 452, 63 P. 723. Same case—119 Cal. 498, 51 P. 845.

11B *Cal. Jr.,* p. 150, Sec. 755.

Every person is conclusively charged with notice of all parts of statutes of the state.

20 *Cal. Jur.,* p. 241, Sec. 9.

Section 1213 Civil Code provides that every conveyance of real property acknowledged and proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of its contents, to subsequent purchasers and mortgagors. The record of an instrument is constructive notice of the contents thereof to subsequent purchases and mortgages. This presumption of knowledge is conclusive and incontrovertible, and there is no need of actual knowledge.

Civil Code, Secs. 18 and 19;

Fair v. Stevenot, 29 Cal. 486;

Anderson v. Wilson, 48 Cal. App. 289, 191 P. 1016.

One subsequently purchasing from vendor is not an innocent purchaser.

ASSIGNMENT OF ERROR NO. 14.

The Court of Appeals erred in finding on R. 15 of the Court's decision in which it refers to the affidavit of Royal E. Handlos and the record of the Court in the *Freeman v. Hopkins et al.,* found 32 F. (2d) 756, 280 U.S. 575, in support of its order dismissing

the action. The *Freeman* case did not relate to any of the property sought to be recovered in this action or affect any of the defendants herein, but was an action to recover certain property alleged to be held in trust in banks in San Francisco. There is not a single word or sentence in the affidavit of Jones M. Griffin, a 75 year old nephew of Mark Hopkins, or in the affidavit of Royal E. Handlos, or in any of the exhibits, which show or tend to show that the plaintiffs discovered or knew of the existence of the property set out in the complaint in this action or discovered the concealment and fraud by which the property was concealed until the year 1945. It is true they learned of the death of Mark Hopkins in the early eighties, and about 1925, they gained information that Mark Hopkins had at the time of his death a large sum of money deposited with the bank and trust companies named as defendants in the *Freeman* case, but these affidavits do not show the heirs had any information concerning the existence of the properties described in petitioners' complaint, or of the acts of fraud set out therein. In dismissing the *Freeman* case, the Court said, at page 757:

> "In passing it may be added that plaintiff is here claiming no interest in the real property of which the decedent was possessed and hence we are not concerned with the validity of either the agreement or deed referred to, or that part of the decree of distribution, * * * The plaintiff failed to allege a cause of action in that it failed to allege lack of notice, extrinsic fraud, that the order directing it was erroneous or defective in any particular, that the ancestress did not appear, that such failure was due to any act or omission

on the part of the administrator or the beneficiaries. * * * In the absence of extrinsic fraud of a material character, generally a decree of distribution made by a probate court having jurisdiction constitutes an adjudication in rem and is binding upon all the world. There is no question of jurisdiction."

In the case at bar the plaintiffs are claiming an interest in real property, as well as other property not mentioned in the *Freeman* action, and allege facts establishing extrinsic fraud; that the order directing the distribution was defective; that the Court was without jurisdiction to distribute the property, in that the order appointing the administrator was void by reason of the administrator having been convicted of an infamous crime, and other reasons heretofore set out. That the ancestors of plaintiffs did not appear and that such failure was due to the fraudulent acts of the administrator. That the ancestors of plaintiffs had no knowledge of the fraud, that plaintiffs had no knowledge of the fraud until 1945, and the plaintiffs in this action ask for relief from the deeds referred to in the complaint and made a part thereof, and attack the validity of the agreements upon which the decree was based.

ASSIGNMENT OF ERROR NO. 15.

The Court of Appeals erred in dismissing this action on the grounds of laches, based upon void judgments, void deeds and void order appointing the administrator, to which deeds, judgments and orders laches and limitations do not apply.

The allegations in the complaint show that the doctrine of laches and the statute of limitations, upon which the Court of Appeals affirmed the order of dismissal is not applicable to the facts alleged in the complaint and shown by the affidavits and other evidence accepted by the Court on motion to dismiss, for the following reasons.

1. Laches and limitations do not run against void judgments and void instruments.

2. The order appointing Moses Hopkins previously convicted of an infamous crime, which was in excess of the Court's jurisdiction and void; Sec. 1369 C.C.P. of California, in effect in 1881, at the time of the appointment of Moses Hopkins as administrator; now Sec. 401 and 420 of the California Probate Code, prohibits such appointment.

3. That the plaintiffs and the defendants hold as tenants in common. One holding in privity of title with another will not be permitted to plead neglect or laches of that other in asserting and taking possession of his interest; in such cases he will be held to be a trustee for the other.

> "A judgment void upon its face and requiring only an inspection of the record to demonstrate its invalidity is a mere nullity; in legal effect no judgment at all, conferring no right and affording no justification. Nothing can be acquired or lost by it. It neither bestows nor extinguishes any right, and may be successfully assailed whenever it is offered as the foundation for the assertion of any claim or title. It neither binds nor bars anyone. All acts performed under it and all claims flowing out of it are void. The parties attempting

to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress. No action upon the part of the plaintiff, no action upon the part of the defendant, no resulting equity in the hands of third persons, no power residing in any legislative or other department of the government, can invest it with any of the elements of power or of vitality. It does not terminate or discontinue the action in which it is entered, nor merge the cause of action; and it therefore cannot prevent the plaintiff from proceeding to obtain a valid judgment upon the same cause, either in the action in which the void judgment was entered or in some other action. The fact that the void judgment has been affirmed on review in an appellate court or an order or judgment renewing or reviving it entered adds nothing to its validity. Such a judgment has been characterized as a dead limb upon the judicial tree, which may be chopped off at any time, capable of bearing no fruit to plaintiff but constituting a constant menace to defendant."

Freeman on Judgments, Vol. 1, 5th Edition, Section 322, page 643.

ASSIGNMENT OF ERROR NO. 16.

The Court of Appeals erred in failing to find that the petitioners have been deprived of their property without due process of law. Wherein it held that the appointment of Moses Hopkins, a person previously convicted of an infamous crime and declared by the statutes of California, incompetent to act as administrator, is valid by reason of lapse of time; and that

"upon his appointment the letters of administration issued to him became conclusive of his qualification and authority to act and the regularity of the proceedings leading up to his appointment. (R. 218. Sec. 1369 Code Civil Pro. in effect in 1881 at the time of the purported appointment of Moses Hopkins.)

(For authorities see assignment of error No. 1.)

Also, in holding that the decree is valid, and that the decree was not a partial distribution. The decree being void for any reason, time does not affect it. Plaintiffs having been deprived of their property without notice, or an opportunity to be heard, they were deprived of their property without due process of law.

Due Process of Law (Volume 12 C.J. p. 1190).

As applied to judicial proceedings, due process of law means a law which hears before it condemns, which proceeds on inquiry, and renders judgment only after trial; law in its regular course of administration through courts of justice:

> "The constitution provides that the citizen shall not be deprived of his property except by the law of the land. The meaning of that provision has generally been construed to be a law that hears before condemning, and arrives at a judgment for the divestiture of the rights of property through what is ordinarily understood to be judicial process—the general rules that govern society in reference to the rights of property. This is the general rule, and it is only in extreme cases, when the preservation and repose of society or the protection of the property rights of a large class of the community absolutely require a departure, that

the courts recognize any exceptions. When, for instance, it becomes necessary to destroy private property to prevent the spread of fire or pestilence in a city, or the advance of an army, the rule is silent, bending to an overruling necessity."

Varden v. Mount, 78 Ky. 86, 89, 39 Am. R. 208.

REQUISITES OF TRIAL BY DUE PROCESS OF LAW.

"Whatever may be the difficulty of defining this phrase of the Constitution when sought to be applied to other proceedings, when used in relation to those of a judicial character, it is evidently, and has been so universally held, intended to secure to the citizen the right to a trial according to the forms of law of the questions of his liability and responsibility, before his person or his property shall be condemned. Judicial action is in such cases imperatively required, and 'implies and includes actor, reus, judex—regular allegations, opportunity to answer, and trial according to some settled course of judicial proceedings.'"

Parsons v. Russell, 11 Mich. 113, 121, 83 Am. D. 728.

To same effect:

Huber v. Reily, 53 Pa. 112.

ASSIGNMENTS OF ERROR 18, 19 AND 20.

The assignments of error, 18, 19 and 20, relate to the power of the Court to render judgment under rule 56, Federal Rules of Civil Procedure, and the insufficiency of evidence to support said findings and order of dismissal.

Upon the motion to dismiss the allegations of the complaint are admitted. The allegations raise questions of fact that require proof; such allegations go to the validity of the decree, the validity of the deeds set out as part of the complaint, the validity of the appointment of Moses Hopkins as administrator and the allegations of extrinsic fraud, require evidence to prove or controvert. Laches or limitations do not appear upon the face of the complaint. The defendants were permitted to offer affidavits on the motion to dismiss in an attempt to show knowledge of the facts alleged in the complaint, which knowledge was denied in the affidavit of Jones Griffin (R. p. 194). These affidavits raise issues of fact that show there is a genuine issue as to material facts, and the order dismissing the action was in excess of the Court's jurisdiction under Rule 56, Federal Rules of Civil Procedure. The petitioners have been deprived of their legal and constitutional rights to be heard upon the merits of the issues alleged in the complaint.

Dated, Sacramento, California,
May 4, 1949.

Respectfully submitted,
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